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NO.

IN THE

Supreme Court of the United States

October Term, 1989

GWENDOLYN BROWN,

Petitioner,

vs.

JAMES G. LEDBETTER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Volume 1 of 2
Petition for Certiorari

PHYLLIS J. HOLMEN
COUNSEL OF RECORD
FOR PETITIONER
SUITE 500
161 SPRING ST., N.W.
ATLANTA, GA 30303
(404) 656-6021

GARY A. RATNER
LISA A. KRISHER
NANCY R. LINDBLOOM
JOHN L. CROMARTIE, JR.
SUITE 500
161 SPRING ST., N.W.
ATLANTA, GA 30303
(404) 656-6021

QUESTIONS PRESENTED

I. Whether the Petitioner, an indigent single parent, has enforceable rights to receive the paternity establishment and child support recovery services required to be provided by the State of Georgia under Titles IV-A and IV-D of the Social Security Act, 42 U.S.C. §§ 601 et seq., and 651 et seq., so as to be able to state a claim under 42 U.S.C. § 1983.

II. Whether the Petitioner has stated a claim under the United States Constitution for deprivation of property without due process, in the failure of the State of Georgia to enforce the child support obligation she was required to assign to it, which may be brought under 42 U.S.C. § 1983.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Petitioner, Gwendolyn Brown, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this action on June 27, 1989. Rehearing and rehearing in banc were denied on September 26, 1989. The writ should issue, pursuant to Supreme Court Rule 17.1(a) and (c), because the

Court of Appeals has decided that the petitioner may not seek redress from the deprivation of important federal rights by a state actor in an action under 42 U.S.C. § 1983. The Court of Appeals' holding confuses the rulings of this Court regarding the enforceability of federal statutory rights under § 1983 with those regarding the implication of private rights of action from federal statutes.

The Circuit Court's holding also conflicts with the precedents of this Court in Maine v. Thiboutot, 448 U.S. 1 (1980) and Wright v. City of Roanoke Redevelopment and Housing Authority, 479 U.S. 418 (1987).

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below were as follows:

Plaintiffs: JOY D. WEHUNT, GWENDOLYN BROWN, BRENDA WHITE

Defendants: JAMES LEDBETTER, in his capacity as Commissioner of the Georgia

Department of Human Resources

MARGARET M. HECKLER, in her capacity as Secretary of the United States Department of Health and Human Services; replaced by OTIS R. BOWEN; currently LOUIS W. SULLIVAN

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Shifting Hardships For Low-Income Housing Residents: Wright v. City of Roanoke Redevelopment and Housing Authority, 35 Wayne L. Rev. 169 (1988) 16

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported as Wehunt v. Ledbetter, 875 F.2d 1558 (11th Cir. 1989). Plaintiffs' petition for rehearing and rehearing in banc was denied by the court without opinion on September 26, 1989, and is reported at 888 F.2d 1398.

The district court's orders on the defendants' motions to dismiss under FED. R. CIV. P. 12(b)(6) were entered on October 1, 1986 and March 11, 1987. These orders are unreported but are included, along with the opinion and orders of the Court of Appeals for the Eleventh Circuit, in the Appendix.

JURISDICTION

The judgment of the Eleventh Circuit United States Court of Appeals was entered on June 27, 1989, and the order denying plaintiffs' petition for rehearing and

rehearing in banc was entered on September 26, 1989. This Petition for a Writ of Certiorari is filed within ninety days of the Court of Appeals' denial of the petition for rehearing and rehearing in banc. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment to the United States Constitution (in relevant part):

> ...[N]or shall any State deprive any person of life, liberty, or property, without due process of law...

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The following matters are lengthy, and are set out in the appendix in accordance with Supreme Court Rule 21.1(f).

42 U.S.C. § 602(a)(26)

42 U.S.C. § 602(a)(8)(A)(vi)

42 U.S.C. § 602(a)(28)

42 U.S.C. § 651

42 U.S.C. § 654(4)

42 U.S.C. § 657(b)(1); -(c)

STATEMENT OF THE CASE

Petitioner Gwendolyn Brown, and her co-plaintiffs below, Joy Wehunt and Brenda White, are indigent single parents who intermittently received cash assistance under the Aid to Families with Dependent Children ("AFDC") program in Georgia for several years. As a condition for receipt of AFDC benefits, they assigned to the State their rights to receive child support for their children. The plaintiffs persistently sought help in collecting child support and in establishing the paternity of certain of their children; Petitioner Brown in particular sought help to collect child support for two of her children, and in establishing paternity and a child support obligation for a third. Nonetheless, the State Office of Child Support Recovery ("OCSR") did nothing for them. Wehunt, 875 F.2d at 1561-2.

States such as Georgia, which partici-

pate in the AFDC program, must develop a plan for delivery of benefits and services which meets dozens of detailed standards set out at 42 U.S.C. §§ 602(a)(1)-(40) of the Social Security Act. ("Title IV-A") 42 U.S.C. § 602 (a)(27), in turn, requires that an AFDC plan include a plan for the delivery of child support recovery and paternity establishment services meeting criteria set out in 42 U.S.C. §§ 651 et seq. ("Title IV-D") The core of the statutory scheme is 42 U.S.C. § 654(4) which mandates that the state undertake to establish paternity and to enforce child support obligations for all AFDC children except where it is in the best interests of a given child not to do so.

The statute details the components of the required service delivery plan. That plan must be reviewed and approved by the Secretary of the U.S. Department of Health and Human Services ("Secretary") pursuant

to 42 U.S.C. § 652(a)(3).

As the statute itself declares, its child support and paternity establishment program seeks to:

> enforc[e] the support obligations owed by absent parents to their children and the spouse (or former spouse) with whom such children are living, locat[e] absent parents, establish[] paternity, obtain[] child and spousal support, and assur[e] that assistance will be available under this part to all children (whether or not eligible for [AFDC]) for whom such assistance is requested.

42 U.S.C. § 651.

In regard to AFDC recipients, these objectives are accomplished in part through the state's undertakings "to secure support for such child" and, in addition, for those born out of wedlock, "to establish the paternity of such child". 42 U.S.C. § 654(4). The fulfillment of these obligations is meant to be accomplished by the specific services that the statute and regulations require the state to provide to persons such as the petitioner.

The statute also creates a specific financial stake on the part of its intended beneficiaries like the Petitioner, apart from the collection of child support itself. While as a general rule any income received by an AFDC family reduces its grant dollar-for-dollar, in the case of child support collected by the state, the first $50.00 must be remitted to the AFDC family, in addition to the AFDC grant to which it would otherwise be entitled. 42 U.S.C. §§ 602(A)(8)(a)(vi); 657(b)(1). Furthermore, in Georgia, which is a so-called "fill-the-gap" state, the family is entitled to receive any child support collections which fill the gap between the state's "payment standard" and its "standard of need", an amount which can be as high as $141, or 34% of its monthly income, for a family of three persons without other income. 42 U.S.C. § 602(a)(28). See generally, Quarles v. St. Clair, 711 F.2d 691

(5th Cir. 1983). The grant paid to an AFDC family is reduced only when support recoveries exceed the State's standard of need for a specific month.

In addition, the State is required to continue child support recovery services for families who have left the AFDC program. Current monthly child support collections are remitted to the family once AFDC terminates. 42 U.S.C. § 657(c). Failure to adopt and implement a plan for child support recovery and paternity establishment can result in loss of federal funds for the entire AFDC program. Breach of an approved plan can lead to escalating fiscal penalties. 42 U.S.C. § 603(h).

Just how serious Congress is about the mandatory nature of the program, and the importance of the services the statute requires, is illustrated by the fact that many of the criteria require participating states to yield to the federal will on

important matters of traditional state prerogative; 42 U.S.C. § 666(a), for example, contemplates mandatory wage withholding of child support payments, expedited judicial proceedings, and interception of state income tax refunds.

The Secretary has further detailed the statutory mandate in extensive regulations at 45 C.F.R. Parts 301-305.

Joy D. Wehunt brought this action on May 9, 1985, under 42 U.S.C. § 1983, asserting jurisdiction under 28 U.S.C. § 1331, against James Ledbetter, Commissioner of the Georgia Department of Human Resources ("Respondent"), who operates the OCSR, seeking injunctive and declaratory relief from his failure to assure that she received adequate and timely child support recovery and paternity establishment services to which Titles IV-A and IV-D entitle her. She also asserted a due process violation based on the State's accepting as-

signment of her child support rights and its subsequent failure to enforce them. Ms. Wehunt sued on behalf of herself and all others similarly situated. Brenda White and Petitioner Brown subsequently intervened and sought to be class representatives.

Following the filing of her lawsuit, Ms. Wehunt did begin receiving child support, and she is no longer a party to this action. At the time of the district court's dismissal of the case, Petitioner Brown had yet to receive any services from the child support recovery or paternity establishment program operated by the Respondent. Wehunt v. Ledbetter, 875 F.2d 1558, 1561.

The district court found that the plaintiffs had no rights under Titles IV-A and IV-D which could be enforced under 42 U.S.C. § 1983. The plaintiffs' motion for class certification was denied by the dis-

trict court as moot when it granted the defendants' motions to dismiss.

A panel of the Eleventh Circuit Court of Appeals affirmed the judgment of the district court, in a 2-1 per curiam decision issued June 27, 1989. Using the analysis established in Cort v. Ash, 422 U.S. 66 (1975), the panel majority held that Titles IV-A and IV-D had been enacted for the "especial benefit" of "society as a whole", conferring on the petitioner no "rights...secured by the...laws" within the meaning of 42 U.S.C. § 1983. Wehunt, 875 F.2d at 1565-6. Judge Clark, in his dissent, found the Cort v. Ash test to be inapplicable, and would have held that Petitioner Brown had enforceable rights under 42 U.S.C. § 1983.

The issues in this Petition are therefore whether Ms. Brown may state a claim under 42 U.S.C. § 1983 against the Respondent Ledbetter for his failures (1) to

operate an effective child support recovery and paternity establishment program as required by Titles IV-A and IV-D of the Social Security Act, of which she is the intended beneficiary, or (2) to take action to enforce her rights to child support, assigned to the State, resulting in a deprivation of her property without due process under the Fourteenth Amendment.[1/]

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. THIS COURT SHOULD RESOLVE THE CONFUSION REFLECTED IN THE ELEVENTH CIRCUIT'S RELIANCE ON CORT V. ASH TO DETERMINE THE EXISTENCE OF A "RIGHT...SECURED BY THE...LAWS" WITHIN THE MEANING OF 42 U.S.C. § 1983.

1/ The plaintiffs also asserted a claim against the Secretary under the Administrative Procedure Act, 5 U.S.C. § 701 et seq. ("APA"), for his failure to comply with his duties to monitor and initiate corrective actions to assure that the Respondent operates an effective child support recovery program. The panel majority's decision, finding plaintiffs had no standing to assert a claim under the APA against the Secretary, is not at issue in this Petition.

A. The Opinions In Wright v. City Of Roanoke Redevelopment and Housing Authority Did Not Adequately Define The Relationship Between Maine v. Thiboutot and Cort v. Ash.

> When should a person injured by a violation of federal law be allowed a remedy in a federal court? This seemingly simple question continues to present...more difficulty than most substantive questions...

Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1, 22-23 (1981) ("Sea Clammers") (Stevens, J., partial dissenting opinion). A substantial, and important, share of this continuing difficulty arises because of the as yet unmet need to define the relationship between the principles of Maine v. Thiboutot, 448 U.S. 1 (1980) ("Thiboutot") and Cort v. Ash, 422 U.S. 66 (1975) ("Cort").

In Thiboutot, the Court held that in the context of federal statutes, Section 1983 provides a private remedy for any deprivation of any "rights...secured by

the...laws". The Court subsequently placed two limitations on Thiboutot: if no "rights" were created in the federal statute for the benefit of the plaintiff, Section 1983 is unavailable, Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981) ("Pennhurst"); or if Congress has created an alternative remedy, Section 1983 is unavailable. Smith v. Robinson, 468 U.S. 992 (1984); Sea Clammers, supra.

In Cort v. Ash, 422 U.S. 66 (1975), the Court established an analysis for determining when a cause of action could be implied from an otherwise silent federal statute. The Cort analysis is necessary for actions between private parties, when the "state action" required under Section 1983 is not at issue. The inquiry in an implied cause of action case involves not only whether there are enforceable rights in the statute at issue, but also whether the implication of a remedy is appropriate.

By contrast, where federal rights are being abridged by state actors, Congressional intent to provide a remedy is solidly manifested in Section 1983, and the Cort analysis is inapt.

In Wright v. City of Roanoke Redevelopment and Housing Authority, 479 U.S. 418 (1987) ("Wright"), this Court faced the application of Thiboutot and Cort by the Fourth Circuit to a claim by public housing tenants under Section 1983 that their rights under federal statutes to pay limited rents, including utility allowances, had been abridged by their housing authority. In asking this Court's aid, plaintiff-petitioners in Wright expressly argued that the Court of Appeals had confounded the two lines of cases, so as to reduce 42 U.S.C. § 1983 to a dead letter as a remedy for violations of federal statutes. Petition for Writ of Certiorari at 9-11, Wright (No. 85-5915). This Court was subsequently briefed

on the conflicting views on the subject which had by then emerged from various courts and commentators. Brief of Petitioner at 27 - 30, Wright (No. 85-5915).

This Court's ultimate decision in Wright, however, neither joined nor settled the issue. Instead, the five member majority opinion and the four member minority opinion took pointedly separate analytical tracks: the majority relied on Thiboutot and did not cite Cort; the minority relied on Cort and did not cite Thiboutot.[2/] The

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2/ That this unusual result may have been confusing is seen in the following pronouncement in the first published law review commentary on Wright:

> The court engaged in judicial legislation when it applied Thiboutot to the evaluation of a section 1983 violation rather than applying the traditional Cort v. Ash standard to determine whether an implied cause of action existed. This activity by the Wright Court fundamentally violated the separation of powers doctrine.

Shifting Hardships For Low-Income Housing Residents: Wright v. City of Roanoke Redevelopment and Housing Authority, 35 Wayne L. Rev. 169, 185 (1988).

majority concluded that the mandatory statutory provisions concerning limitations on rent, together with the statute's interpretation by regulation, created rights enforceable by tenants.

Other than Pennhurst and Wright, which established that "rights" must be founded on mandatory, rather than precatory, legislative provisions, this Court has not taken the opportunity to indicate in more detail how rights enforceable under Section 1983 are to be identified.[3/]

3/ The importance to this Court of the matter of when rights are enforceable under Section 1983 may be indicated by the grant of certiorari on Question One ("Does Medicaid provider have private federal cause of action under 42 U.S.C. § 1983 to enforce Medicaid Act against state?"), in Baliles v. Virginia Hospital Association, No. 88-2043, 10-2-89, 58 L.W. 3021. See also, Coos Bay Care Center v. Oregon, 803 F.2d 1060 (9th Cir. 1986), cert. granted, 481 U.S. 1036, vacated as moot, ___ U.S. ___, 108 S.Ct. 52 (1987), which raised similar issues. Likewise, certiorari should be granted in this case to assure consistency between Baliles and the instant case.

B. The Lower Courts Are Confused About The Appropriate Analysis For Evaluating Rights Alleged To Arise From Federal Statutes.

In Wright's wake, the Courts of Appeals have continued to take a troubling variety of approaches to the issue of assessing when "rights" are created by federal statutes which may be enforced under Section 1983. In the instant case, the Eleventh Circuit Court of Appeals, citing Cort, concluded that petitioner was not a rights holder under the child support and paternity establishment program of Titles IV-A and IV-D of the Social Security Act, even though as a potential beneficiary she would stand to receive a wide array of valuable and important services to assist her in establishing the paternity of her child, and in collecting child support, were the Respondent to comply with the federal statutory and regulatory requirements.

By contrast, other courts have readily proceeded to enforce the Titles IV-A and IV-D mandates in actions brought by beneficiaries of child support and paternity establishment services under Section 1983. Bennett v. White, 865 F.2d 1395 (3d Cir.), cert. denied on other grounds, ___ U.S. ___, 109 S.Ct. 3247 (1989); Quarles v. St. Clair, 711 F.2d 691 (5th Cir. 1983); Vanscoter v. Bowen, 706 F. Supp. 1432 (W.D.Wa. 1988), pending on appeal, No. ____; Beasley v. Harris, 671 F. Supp. 911 (D.Conn. 1987).

The divergence has not been confined to cases under Titles IV-A and IV-D. The Ninth Circuit, for instance, citing Cort, found that bridge users were rights holders under a requirement that bridges built with federal grant funds be toll free, so as to enable them to sue under Section 1983. Clallam County v. Department of Transportation of the State of Washington, 849 F.2d 424 (9th Cir. 1988), cert. denied, ___ U.S.

___, 109 S.Ct. 790 (1989).

In West Virginia University Hospital v. Casey, 885 F.2d 11, 19 n.1 (3d Cir. 1989), the court rejected use of the Cort analysis in a Section 1983 case, although it suggested that the Cort and Section 1983 analyses intersect on the issue of determining the existence of a "right", the first of four factors considered under Cort.[4/] In holding that the plaintiff hospital had rights arising from federal Medicaid statutes enforceable under Section 1983, the court looked to the mandatory language of the statute, contrasting it with that in Pennhurst.

On the other side, after undertaking an exhaustive post-Wright analysis of the Thiboutot/Cort lines of cases, the Court of Appeals for the District of Columbia found

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4/ The court noted, however, that the Section 1983 test is generally "more favorable" than the Cort analysis to the plaintiff seeking to enforce a federal statutory right.

no enforceable rights conferred on public housing tenants by a section of the United States Housing Act. Edwards v. District of Columbia, 821 F.2d 651 (D.C.Cir. 1987). A divided court recognized that under this Court's decisions enforceable rights are more easily found under Section 1983 cases than under the Cort analysis. Even so, somewhat differently reasoned opinions by two of the three judges concluded that under 42 U.S.C. § 1437p, public housing tenants had no rights to challenge the "constructive demolition" of a public housing project. Significantly, Congress found the court's result plainly wrong, moved swiftly to declare it so, and enacted clarifying legislation. H.R. Conf. Rep. No. 426, 100th Cong., 1st Sess., reprinted in 1987 U.S. CODE CONG. ADMIN. NEWS 3317, 3469. See also, Vantage Healthcare Corp. v. Virginia Bd. of Med. Assiss., 684 F.Supp. 1329, 1331 (E.D.Va. 1988), pending

on appeal, No. 88-3872 (finding no rights enforceable by providers of Medicaid services, relying on Cort).

Allandale Neighborhood Association v. Austin Transportation Study Policy Advisory Committee, 840 F.2d 258 (5th Cir. 1988), though not precisely on point, nonetheless reveals a Court of Appeals viewpoint which could benefit from greater clarity by this Court about the relationship between the implied cause of action cases and those under Section 1983. Plaintiffs sought a private remedy against the defendant, a metropolitan planning agency appointed by the Governor of Texas under a federal highway planning statute. The court noted that if the agency were a state body, the claim might fall within the scope of Section 1983. Relying on the fact that plaintiffs had not made that contention, the court claimed discretion whether to decide the point, then declined to do so.

Next, the Allendale court conducted an extended analysis of whether there was an implied cause of action, including a search for "any indication of legislative intent, explicit or implicit, either to create...a remedy or deny one." 840 F.2d at 258, quoting Cort, 422 U.S. at 78. If, however, that search was one for Congress' intent for dealing with the type of case presented on the record before them, it made little sense for the Allandale panel to decline to consider whether Congress had provided that answer in Section 1983 itself. Thus, it may well be that the Allandale court did not exercise its best judgment in affirming the dismissal of a complaint without deciding whether the allegations therein were sufficient to support an action under Section 1983.

The confusion which arose between Cort and Thiboutot still mounts; Pennhurst, Sea Clammers, and Wright have failed to provide

adequate guidance to lower courts evaluating claims of statutory rights enforceable under Section 1983. This needs further clarification by this Court.

C. Actions Of The Circuit Courts Leave Congress With No Clear Idea How To Create Rights Enforceable Under Section 1983.

Congress must legislate against the backdrop of interpretation by this Court and the lower courts as to how to accomplish its aims. The early case law following Thiboutot reflected a more hospitable analysis under Section 1983 and the historical importance of that remedy in the protection of federally-created rights. See, Samuels v. D.C., 770 F.2d 184, 194 n.7 (D.C.Cir. 1985). Courts then routinely entertained challenges to state-run federal

benefits programs under Section 1983.[5]

The more recent application of the Cort stricter standard to Section 1983 actions, however, has eroded that jurisprudence and gives far less reliable guidance to Congress -- to the point where that body looking at the case law can have no clear idea what it must do to preserve the Section 1983 remedy for federal rights holders injured by state actors.[6]

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[5] Gonzalez v. Pingree, 821 F.2d 1526 (11th Cir. 1987) (Food Stamp program); Coos Bay Care Center, supra (Medicaid program); Lynch v. Dukakis, 719 F.2d 504 (1st Cir. 1983) (Title IV-E of the Social Security Act); Crawford v. Janklow, 710 F.2d 1321 (8th Cir. 1983) (low income home energy assistance program). See also, Baliles v. Virginia Hospital Association, 868 F.2d 653 (4th Cir.), cert. granted, No. 88-2043, (Oct. 2, 1989), 58 L.W. 3021 (Medicaid program).

[6] Furthermore, uncertainty about statutory Section 1983 actions is likely to be exacerbated by recent developments in the Court's jurisprudence. First, there is the movement toward a more committed "textualism", exemplified by Justice Scalia's statements in Green v. Bock Laundry Mach. Co., ___ U.S. ___, 109 S.Ct. 1981 (1989).

(FOOTNOTE CONTINUED ON NEXT PAGE)

The implied cause of action jurisprudence under Cort is simply inappropriate for Section 1983 cases. The Cort criteria tend to constrain and distort the proper scope of rights which should be enforceable under Section 1983. Particularly in view of this Court's acknowledgement that "'[w]e do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy' for the deprivation of a federally secured right," Wright, 479 U.S. at 423, quoting Smith v. Robinson, 468 U.S. at 1012, the confusion of circuit courts between the Thiboutot line of cases with

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6/ (continued from previous page) Next is the suggestion, also advanced by Justice Scalia and earlier advanced by Justice Powell, that the Court should cease altogether to recognize implied causes of action. See Thompson v. Thompson, 484 U.S. 174, 188 (1988) (concurring opinion). Finally, there has been the recent use of Section 1983's remedy for "rights...secured by the...laws to defeat, rather than to advance, a cause of action pursuant to a substantive civil rights statute. Jett v. Dallas Independent School Dist., ___ U.S. ___, 109 S.Ct. 2702 (1989).

those following Cort, continues to threaten the viability of Section 1983 as a remedy, just as the plaintiff-petitioners in Wright warned. This should be remedied.

II. THIS COURT SHOULD DECLARE THAT THE CORT ANALYSIS IS INAPPROPRIATE FOR RIGHTS CLAIMED TO BE ENFORCEABLE UNDER SECTION 1983.

A. The "Especial Benefit" Test From Cort Is Too Narrow To Be Used In Section 1983 Cases.

Like analysis under Section 1983, analysis under Cort begins with a search for a "right" created by the federal statute in question. Under Cort, the existence of the right is tested by asking whether the plaintiff is one of the class for whose "especial benefit" the statute was enacted. Cort, 422 U.S. at 78, quoting Texas & Pacific Railway Company v. Rigsby, 241 U.S. 33, 39 (1916) (emphasis added in Cort). The emphasis on the word "especial" invites the exclusion of those who are merely "beneficiaries", but who are not "especial bene-

ficiaries". In a Section 1983 case, the invitation to find the "especial" beneficiary, to the exclusion of other bona fide beneficiaries, should be refused. Instead, the receipt of real and appreciable benefits pursuant to the mandate of a statutory text should always be taken as a condition sufficient to establish a "right...secured by the...laws" under Section 1983.

B. Application Of The Remaining Cort Criteria Further Distorts Proper Analysis Under Section 1983.

Circuit court confusion of Thiboutot and Cort has not stopped with the identification of rights. Some have endeavored to apply other Cort factors in Section 1983 cases. Although the Court of Appeals in the instant case did not go so far, the other cases illustrate the inappropriateness of the other factors in the Section 1983 context as well.

Section 1983 is its own clear statement of an intent to provide a remedy for

violation of a "right...secured by the...laws"; to look for other evidence of Congressional intent to favor a remedy is needless. Sea Clammers shows that Congress may foreclose the Section 1983 remedy in certain cases.7/ On the other side, in implied cause of action cases, the second of the four Cort factors, examining evidence of Congressional intent to provide or to deny a private remedy, is now held to be the key inquiry. See, e.g., Merrill Dow Pharmaceuticals, Inc., v. Thompson, 478 U.S. 804, 812 n.9 (1986). This element of the Cort analysis, however, is significant-

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7/ The manner in which the Court of Appeals disposed of the instant case meant that it did not have consider the question of preclusion under Sea Clammers. Judge Clark, in dissent, would have held against preclusion. Wehunt, 875 F.2d at 1575-76.

Should it decide to grant the petition for certiorari, this Court may wish to direct that this question be addressed in briefing and argument. Alternatively, the matter could be determined on remand, should the Court of Appeals decision be ultimately reversed.

ly different from the foreclosure inquiry in a Section 1983 case.

Furthermore, once a "right...secured by the...laws" has been identified, and it has also been determined that Congress has not foreclosed the remedy, the analysis under Section 1983 is at an end. If Congress has created the "right" and not foreclosed Section 1983's remedy, there is no point in asking either of the two additional questions addressed in a Cort analysis. Congress' "right" and "remedy" answer any legitimate question of consistency with the underlying purposes of the legislative scheme (the third Cort factor). Similarly, Congress' choices of "right" and "remedy", assuming their own constitutionality, override the judicial concern with federal-state relations issues reflected in fourth and final Cort factor. Thus, analyzing a Section 1983 case under either the third or the fourth factor would also simply invite

error.

In summary, this Court should grant certiorari in this case to clarify that the Cort analysis is wholly inappropriate in the context of a Section 1983 claim founded on federal statutory rights.

C. This Case Is An Excellent Opportunity For This Court To Articulate The Proper Section 1983 Analysis.

1. Petitioner Has Rights Under Titles IV-A and IV-D of the Social Security Act.

The Eleventh Circuit Court of Appeals held that the Petitioner Gwendolyn Brown had no "rights...secured by the...laws", the deprivation of which could be redressed under Section 1983. Specifically, the Court found that Petitioner, an AFDC recipient, did not have the "right" to receive the child support and paternity establishment services which Titles IV-A and IV-D mandate that states participating in the AFDC program furnish to AFDC recipients. Significantly, Petitioner never claimed a

right to receive child support or a paternity determination itself; rather, she claimed an entitlement to the program of services which the state must provide once it decides to participate in the AFDC program and accepts federal dollars therefor.

Congress and the Secretary have spelled out in precise language both the specific duties to which Titles IV-A and IV-D hold a state, that is, the specific services which must be provided to those such as Petitioner, and the mechanism providing for the administration of specific sanctions for breach of those duties. Specific duties and sanctions prove a mandatory legislative scheme, not one which is merely precatory; and the availability of the Section 1983 remedy is wholly consistent with this Court's analysis in Pennhurst. Moreover, under Wright, these conditions are sufficient to confer rights on Petitioner. The Eleventh Circuit, however,

has stripped her of any remedy for enforcing those important and valuable rights.

2. The Court Of Appeals' Application Of The "Especial Benefit" Test In This Case Led To An Absurd Result.

Though the Petitioner plainly is within the class of persons granted real benefits by Titles IV-A and IV-D, the court ignored her, and ignored the specific duties and specific benefits created in the statutory text, the factors which were sufficient in Wright to create enforceable rights. Instead, the court searched for the "class of persons for whose especial benefit the statute was enacted". Wehunt, 875 F.2d at 1564, quoting Cort. Seizing on two excerpts from an extensive legislative history 8/, the court reached a conclusion

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8/ Even in the key passage on which it purported to rely, however, the panel majority missed Congress' own comparison of immediate and ultimate purposes:

> The immediate result [of Title IV-D] will be a lower welfare cost to the

(FOOTNOTE CONTINUED ON NEXT PAGE)

-- the likes of which no federal court considering a piece of federal legislation could ever deny -- that Congress acted with the intent to benefit society as a whole. This produced a truism and an absurdity: "Title IV-D will benefit the general public". 875 F. 2d at 1563.

No search for a more remote, but more intended, beneficiary should exclude recourse to law by those persons to whom statutory language itself grants some tangible advantage. In Wright, for instance, tenants were found to have enforceable rights, notwithstanding an overall legisla-

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8/ (continued from previous page) taxpayer but, more importantly, as an effective system is established fathers will be deterred from deserting their families to welfare and children will be spared the effects of family breakup.

S. Rep. No. 1356, 93rd Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 8133, 8146 (emphasis added). See, generally, Wehunt, 875 F.2d at 1565 (majority opinion), 875 F.2d at 1573 (dissenting opinion by Judge Clark).

tive goal that public housing should clear slum blight. The Cort test applied by the Eleventh Circuit, here, however, produces an outcome which obliterates any meaning of the term "beneficiary" altogether. Moreover, it deprives Petitioner of any means by which to assure that she has access to the critically important program of child support and paternity establishment services which Congress created for her.

This mode of analysis threatens to remove vast areas of federal statutory rights from the reach of the Section 1983 remedy. All acts of Congress, especially in the social welfare area, can fairly be said to, in the words of the Court of Appeals, "benefit[] society as a whole rather than specific individuals". For example, the Social Security laws -- the laws on which both the instant action and Thiboutot itself were based -- serve the broadest of public purposes through services delivered

to millions of individuals like the Petitioner. The opinion below portends that many of them, including the Petitioner and her class, have no "right" to receive the very specific services and benefits which these laws provide, contrary to dozens of this Court's holdings. So important a question needs to be addressed by this Court.

III. THIS COURT SHOULD HOLD THAT THE LOWER COURTS ERRED IN DISMISSING, WITHOUT FIRST ADDRESSING, PETITIONER'S CLAIM THAT SHE WAS DEPRIVED OF PROPERTY WITHOUT DUE PROCESS WHEN THE STATE FAILED TO TAKE ACTION TO ENFORCE THE RIGHTS TO CHILD SUPPORT WHICH SHE HAD ASSIGNED TO IT.

In her complaint, Petitioner asserted that the Respondent's acts and omissions in administering the child support program violated her right to property secured by the due process clause of the Fourteenth Amendment. Specifically, she alleged that she was deprived of an economic benefit to which the act entitled her: the amount of

child support collections which, having been assigned from Petitioner to the Respondent, should be returned to Petitioner by operation of 42 U.S.C. §§ 602(a)(3)(A)(vi), 602(a)(28), and §657(b)(1). Neither the district court nor the Court of Appeals addressed this issue, although Petitioner briefed the issue at both levels. Although not the result of deliberation, the Court of Appeals' disposition of this issue is in conflict with the decision in Bennett v. White, 865 F.2d 1408 (3d Cir.), cert. denied on other grounds, ___ U.S. ___, 109 S.Ct. 3247 (1989), which assumed the availability of a Section 1983 remedy for a similar due process challenge to a state's failure to pay to families the share of collected support payments to which Titles IV-A and IV-D entitle them.

Accordingly, this Court should grant certiorari on this constitutional issue as well as the statutory issue argued above,

and thus preserve Petitioner's opportunity to pursue that issue. Petitioner recognizes that, as an alternative to resolving the constitutional issue in this Court, it may be preferable that the issue be first addressed by the Court of Appeals or the district court. This may be particularly appropriate in that, if Petitioner is successful in certain particulars of her statutory claim, the Fourteenth Amendment issue is likely to be avoidable.

CONCLUSION

This Court should grant certiorari to remedy the mounting confusion among lower courts regarding the proper analysis for determining when a plaintiff has a right arising from a federal statute enforceable under Section 1983. The Court should expressly hold that the Cort analysis is inappropriate in such instances. Finally, the Court should hold that the intended receipt of real and appreciable benefits

pursuant to the direction of a statutory text should always be taken as a condition sufficient to establish a "right...secured by the...laws" under Section 1983.

For these reasons, this Court should grant this Petition for Certiorari.

Respectfully submitted,

PHYLLIS J. HOLMEN
COUNSEL OF RECORD FOR PETITIONER

GARY A. RATNER

LISA A. KRISHER
NANCY R. LINDBLOOM
JOHN L. CROMARTIE, JR.

161 Spring St., N.W.
Atlanta, GA 30303
(404) 656-6021

ATTORNEYS FOR PETITIONER

Date submitted_____

89-1030

Supreme Court, U.S.
FILED
DEC 22 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO.

IN THE

Supreme Court of the United States

October Term, 1989

GWENDOLYN BROWN,

Petitioner,

vs.

JAMES G. LEDBETTER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Volume 2 of 2
Appendix

PHYLLIS J. HOLMEN
COUNSEL OF RECORD
FOR PETITIONER
SUITE 500
161 SPRING ST., N.W.
ATLANTA, GA 30303
(404) 656-6021

GARY A. RATNER
LISA A. KRISHER
NANCY R. LINDBLOOM
JOHN L. CROMARTIE, JR.
SUITE 500
161 SPRING ST., N.W.
ATLANTA, GA 30303
(404) 656-6021

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Joy D. WEHUNT, Plaintiff,

v.

James G. LEDBETTER, in his official capacity as Commissioner of the Georgia Department of Human Resources and Louis Sullivan, Defendants-Appellees.

Gwendolyn Brown,
Intervenor-Appellant.

No. 87-8345.

United States Court of Appeals,
Eleventh Circuit.

June 27, 1989.

AFDC recipients brought suit seeking to require the State of Georgia and the Department of Health and Human Services to administer and enforce the child support provisions of the Social Security Act. The United States District Court for the Northern District of Georgia, No. C85-2891A, J. Owen Forrester J., granted motion to dismiss, and one recipient appealed. The Court of Appeals held that: (1) child support provisions of the Social Security Act do not create rights enforceable in a private suit by an AFDC recipient, and

(2) recipient lacked standing to challenge administration of child support provisions by the Secretary of Health and Human Services.

Affirmed.

Clark, Circuit Judge, filed a dissenting opinion.

1. Civil Rights 13.3(1)

Section 1983 does not encompass claims based on statutory violations if Congress has foreclosed private enforcement in enactment of the statute, or Congress has not created enforceable rights in the relevant statutory provisions. 42 U.S.C.A. § 1983.

2. Social Security and Public Welfare 194.21

Child support provisions of Title IV-D of the Social Security Act did not create rights which AFDC beneficiaries may enforce by means of a private cause of action;

provisions were not enacted for the "especial benefit" of AFDC families, but to recover welfare payments and to reduce the welfare rolls by establishing and enforcing support obligations. Social Security Act, § 451 et seq., as amended, 42 U.S.C.A. § 651 et seq.

3. Administrative Law and Procedure 666

In order to have standing to sue under the Administrative Procedure Act, plaintiffs must be injured in fact, and interest sought to be protected must be arguably within "zone of interests" to be protected or regulated by the statute. 5 U.S.C.A. § 701 et seq.

4. Federal Civil Procedure 103.2

Doctrine of Article III standing requires that plaintiff allege some actual or threatened injury that is fairly traceable to defendant and can be remedied by an

order directed against defendant. U.S.C.A. Const. Art. 3, § 1 et seq.

5. Social Security and Public Welfare 194.21

AFDC recipient lacked standing to challenge the Secretary of Health and Human Services' administration of child support provisions of the Social Security Act, as they related to the State of Georgia; injuries alleged by recipient, loss of $50 in child support and failure to establish her child's paternity, were caused directly by absent father, and nexus between injuries and the Secretary was attenuated at best, as it was far from certain that withholding of funds would result in more vigorous enforcement of Georgia child support laws. Social Security Act, § 451 et seq., as amended, 42 U.S.C.A. § 651 et seq., U.S.C.A. Const. Art. 3, § 1 et seq.

Kay A. Giese, Athens, Ga., John Riemer, Gainesville, Ga., Phyllis J. Holmen, Atlanta, Ga., Nancy R. Lindbloom, Georgia Legal Services, Athens, Ga., for Gwendolyn Brown.

Paula Roberts, Center for Law & Social Policy, Washington, D.C., for amicus Center for Law & Social Policy.

Mary Foil Russell, State of Ga. Law Dept., Atlanta, Ga., for defendants-appellees.

Robert E. Keith, Office of General Counsel, HHS, Washington, D.C., for Bowen.

Susan Hoffman, Hogan & Hartson, Washington, D.C., for amicus Center for Law & Social Policy.

Nancy Ebb, Children's Defense Fund, Washington, D.C., for amicus Children's Defense Fund.

Appeal from the United States District Court for the Northern District of Georgia.

Before FAY and CLARK, Circuit Judges, and GUIN*, District Judge.

Appeal from the United States District Court for the Northern District of Georgia.

PER CURIAM:

Presently before the court is a challenge to the program established under the Aid to Families with Dependent Children (AFDC), 42 U.S.C. §§ 651 et seq. (1982 & Supp., III 1985), by recipients of its benefits. The challenge seeks to require the State of Georgia and the Department of Health & Human Services to administer and enforce the provisions of Title IV-D of the Social Security Act, 42 U.S.C. § 651 et seq. (hereinafter The Act). In separate orders, the district court dismissed the plaintiffs' various claims. For the

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* Honorable J. Foy Guin, Jr., U.S. District Judge for the Northern District of Alabama, sitting by designation.

reasons which follow, we affirm the district court.

Background

A. The Statutory Framework

The AFDC program, also known as Title IV-A of The Act, is a federal-state welfare program for poor families deprived of support of one parent due to that parent's absence, death, or incapacity. 42 U.S.C. § 601 et seq. States administer program benefits in accordance with federal requirements, and the Department of Health & Human Services (HHS), which is responsible for program oversight,[1]

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[1] 42 U.S.C. § 602(b)-(c). Section 602(a) requires that the States must establish a plan for aid and services to needy families with children and that the plan be mandatory upon all political subdivisions of the state. Section (b) pertains to approval of the state plans by the Secretary of HHS [hereinafter Secretary], and section (c) deals with the Secretary's duties pertaining to the compilation of data, publishing of findings, and reports to Congress.

withholds or reduces federal matching funds if a state fails to comply with those requirements.[2]

In 1975 Congress amended The Act to require a state operating an AFDC program to establish a separate child support enforcement unit to serve both AFDC and non-AFDC families.[3] Pub.L. 93-647, § 101(d)(5)(c) et seq., 88 Stat. 2351 (1975) (codified at 42 U.S.C. § 602(27)). The law made provision to locate absent parents, establish paternity and support obligations on behalf of children in need of those services, and enforce child support obligations assigned to the enforcement unit.[4] In 1984 Congress passed the Child Support Enforcement Amendments,

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2 42 U.S.C. § 604. Deviation from plan.

3 Title IV-D of The Act.

4 42 U.S.C. §654(4), (6), (9).

Pub.L. 98-378, 98 Stat. 1305, by which states were to implement the child support enforcement mechanisms specifically enumerated in the statute to "increase the effectiveness" of the programs administered by the states. The states are required to create a system of wage withholding which can automatically recover child support and arrearages. 42 U.S.C. § 666(a)(1), (8) and § 666(b). Procedures by which the state child support enforcement agency and the state shall provide for enforcing a support order follow: require the parent to post security or a bond;[5] impose liens on real or personal property;[6] withhold the amount of an arrearage from tax returns;[7] and,

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5 42 U.S.C. § 666(a)(6)

6 42 U.S.C. § 666(a)(4).

7 42 U.S.C. § 666(a)(3).

report significant arrearages to credit reporting agencies.[8]

The AFDC program is a contractual arrangement by which the federal government and the states work together. The program is funded by both, with the federal government making payments to the states by set formula. [9] The Secretary is empowered to evaluate the implementation of state programs and conduct audits of the plans to assure conformity with the requirements.[10] If the evaluation and audit show nonconformity, the Secretary must reduce or suspend payment to the noncomplying state until such time as the state program is found to be in substantial compliance.[11]

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8 42 U.S.C. § 666(a)(7).

9 42 U.S.C. § 603.

10 42 U.S.C. § 652(a)(4).

11 42 U.S.C. § 603(h).

As a condition for receiving AFDC benefits, an applicant must assign to the state any support rights the family has and must cooperate with the state agency's efforts to establish paternity and collect support unless such cooperation is against the best interests of the child.[12] Except for the first fifty dollars of child support collected each month, which is paid to the family and does not affect the family's AFDC eligibility or decrease any amount otherwise payable as assistance to such family, the state retains support collections to held offset welfare expenditures on the family's behalf.[13] If a support collection exceeds the family's AFDC grant, "the State will determine if such collection, when treated as if it were

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12 42 U.S.C. § 602(a)(26).

13 42 U.S.C. §602(a)(8)(A)(vi); 42 U.S.C. § 657(b).

income, makes the family ineligible for an assistance payment." In such event the family receives the full amount of the support payment.[14]

Congress again amended The Social Security Act in 1988 to replace the AFDC program with a comprehensive program of mandatory child support and work training. Publ.L. 100-485, 102 Stat. 2345 (1988). The revisions are designed to emphasize parental responsibility and strengthen the child support enforcement system. States are required to establish guidelines which must be used in setting child support awards.[15] Additionally, they are required to provide mechanisms to facilitate the periodic updating of child support awards,

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14 45 C.F.R. § 232.20(b) (1987).

15 These guidelines are binding on judges and other officials unless there is good cause shown.

and to institute a system of immediate wage withholding for all new or revised child support cases. The bill provides for the establishment of a commission on interstate enforcement, the establishment of an automated tracking and monitoring system, and the use of parents' social security numbers for identification purposes at birth, among other things. Under II. General Discussion of the bill, the Senate Report states:

> We need now to fashion a firm and effective welfare structure, one that addresses the needs of all areas of the country.
>
> The bill reported by the Committee on Finance seeks to do this. It builds upon a strong consensus, joined in by liberals and conservatives alike, that the Nation's welfare system must stress family responsibility and community obligation, enforce the principle that child support must in the first instance come from parents, and reflect the need for benefit improvement, program innovation, and organizational renewal at every level and the system.

Id.

One of the major elements in the revision of The Act is to strengthen the child support system by improving all stages of the enforcement process. It requires the Secretary "to set standards specifying time limits in which a state must respond to requests for service, including requests to locate absent parents, establish paternity, or initiate proceedings to establish and collect support." This addition eliminates the possibility of a time delay inherent in the system as it was at the time the instant suit was filed.

B. Procedural History

Gwendolyn Brown is the mother of three minor children. The oldest child, Kateia Nicole Pinkston, was born out of wedlock January 22, 1977. Except for short periods of time when she was able to obtain employment, Ms. Brown received AFDC benefits under the Georgia Title IV-A program for Kateia from 1978 through 1987.

As a condition to receive AFDC, pursuant to the enacting legislation, Ms. Brown was required to cooperate with the state in establishing Kateia's paternity and securing a support order for her.[16] She was further required to assign to the state her right to support monies paid on Kateia's behalf.[17]

Although the Georgia Department of Human Resources (the IV-D agency) has the responsibility of locating Kateia's father, establishing paternity for her, and

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16 42 U.S.C. § 602(a)(26)(B).

17 42 U.S.C. § 602(a)(26)(A). As the court has noted, except for the first fifty dollars of child support collected each month, which is paid to the family and <u>does not affect the family's AFDC eligibility or decrease any amount otherwise payable as assistance to such family</u>, the state retains support collections to help offset welfare expenditures on the family's behalf.

obtaining a support order on her behalf, the Georgia IV-D agency has yet to do so.

In 1977, Ms. Brown was married. The two children of the marriage are Crystal Sabrina Brown, born January 4, 1979, and Jeriquces Blane Brown, born November 1, 1980. When their father deserted the family, Ms. Brown applied for and received AFDC for these two children as well as Kateia.[18]

Ms. Brown was divorced from Mr. Brown in November 1982. The divorce decree ordered Mr. Brown to pay twenty dollars per week as support for each of his children. The Georgia IV-D agency has failed to collect the payments.

Joy Wehunt Lewallen, the original plaintiff in this action, brought suit to

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18 The application and receipt of benefits was pursuant to statute.

obtain IV-D agency assistance in establishing the paternity of and support for her youngest child Tiffany, born in December 1983. Although she had received intermittent AFDC payments it was not until suit was filed in May 1985 that the Georgia IV-D agency took steps to determine paternity and secure child support for Tiffany.[19]

Brenda White, one of the intervenors, mother of three minor children, receives no paternal support for two of her children. Ms. White has received intermittent AFDC payments from about 1969 onward. During this period of time, although she has cooperated with the agency, as have Ms. Brown and Ms. Lewallen, the agency has taken no action to secure support for her children.

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19 Under the 1988 amendments placement of time limitations for compliance with the statute will prevent undue delay.

This action was brought to Lewallen on May 9, 1985, in the Federal District Court for the Northern District of Georgia. Lewallen asserted a claim under 42 U.S.C. § 1983 against the Commissioner of the Georgia Department of Human Resources hereinafter the Commissioner seeking declaratory and injunctive relief with respect to defendant's violation of her rights under two Social Security Act programs, the AFDC 42 U.S.C. §§ 601, et seq. (Title IV-A), and the Child Support and Establishment of Paternity Act, 42 U.S.C. §§ 651, et seq. (Title IV-D). The Title IV-A claims against the Commissioner were settled after he adopted a revised policy as to the definition of "child support." This definition was incorporated into a consent order agreed to by all parties and adopted as the order of the district court on January 20, 1987. Thus, the Title IV-A claim is not at issue in the

instant appeal. Lewallen's remaining claim against the Commissioner centered around his failure to provide her with the services necessary to locate the father of her child, establish paternity of that child, and establish and enforce a support obligation for that child, in violation of the Child Support and Establishment of Paternity Act. Plaintiff Lewallen also sued the Secretary, asserting that he had failed in his duty to oversee Georgia's operation of its state plans under Titles IV-A and IV-D and in his obligation to enforce compliance by the Commissioner with the conditions of participation in the AFDC program.

On October 23, 1985, the district court granted the motion of Brenda White and Gwendolyn Brown to intervene as plaintiffs and to file an amended complaint. Plaintiffs then moved for class certification and for leave to file a

second amended complaint to clarify certain class allegations. In their second amended complaint, plaintiffs made clear that the class injury for which they sought redress was the Commissioner's systematic failure to (1) implement and operate a statewide child support enforcement program which diligently sought to establish paternity, locate absent parents, establish child support obligations and collect child support, as required by Title IV-D and its implementing regulations; and (2) assure that the Georgia IV-D program operated in compliance with the statute and regulations. Leave to file a second amended complaint was granted, and the plaintiffs initiated discovery as to both defendants.

At plaintiffs' request, a status conference was held April 23, 1986. At that time the court directed that any motions under Fed.R.Civ.P.12 be filed

within thirty days. The court also stayed discovery, deferred plaintiffs' motions to compel discovery and class certification, granted plaintiffs the opportunity to redefine their class, and stated its intention to extend discovery if plaintiffs' case survived any Rule 12 motions. The Commissioner and the Secretary filed motions to dismiss under Rule 12, claiming the plaintiffs had failed to state claims upon which relief could be granted. The plaintiffs responded to the defendants' motion to dismiss, and also moved for leave to file a third amended complaint.

On October 1, 1986, the court entered an order holding that, under Brown v. Housing Authority of McRae, 784 F.2d 1533 (11th Cir. 1986), vacated pending reh'g en banc, 804 F.2d 612 (11th Cir. 1986), on reh'g, 820 F.2d 350 (11th Cir. 1987), the plaintiffs' claim against the Commissioner

under 42 U.S.C. § 1983 and their claim against the Secretary under 423 U.S.C. §§ 651 et seq., had to be dismissed under Rule 12(b)(6). The district court reasoned that Congress had foreclosed private enforcement of Title IV-D and there was no implied right of action under the statute. In its order, the district court granted the plaintiffs' motion for leave to file a third amended complaint, and denied as moot the plaintiffs' motion for class certification.

On October 17, 1986, plaintiffs filed their third amended complaint, asserting claims against the Secretary under the Administrative Procedure Act, 5 U.S.C. §§ 701 et seq [hereafter APA], and for mandamus relief pursuant to 28 U.S.C. § 1361. In addition, in order to appeal, plaintiffs sought entry of a judgment based on October 1, 1986, order under Fed.R.Civ.P. 54(b). In light of the fact

that the Eleventh Circuit Court of Appeals had vacated its decision in Brown v. Housing Authority of McRae, pending rehearing en banc, the plaintiffs also moved in the district court for an order setting aside the October 1, 1986, order. In an addendum to that motion plaintiffs brought to the district court's attention the Supreme Court's decision in Wright v. Roanoke Redevelopment and Housing Authority, 479 U.S. 418, 107 S.Ct. 766, 93 L.Ed.2d 781 (1987), which implicitly overturned parts of the Brown decision.[20]

The Secretary answered the plaintiffs' third amended complaint and on December 3, 1986, filed a motion under Fed.R.Civ.P. 12, alleging that the plaintiffs had failed to state a claim upon which relief could be

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20 Relying on Wright, the en banc court in Brown remanded the case to the district court. 820 F.2d 350, 352 (11th Cir. 1987) (en banc).

granted. On January 14, 1987, plaintiffs moved for class certification on the APA and mandamus claims. The district court entered an order March 11, 1987, granting the Secretary's motion to dismiss and denying the plaintiffs' for class certification. The district court held that the plaintiffs lacked standing under the APA. The court also denied the plaintiffs' motion to set aside the October 1, 1986, order, concluding that its previous decision was not changed by Wright and Brown. Ms. Brown filed a notice of appeal as to both the state and federal defendants on May 8, 1987, and the appeal was docketed on May 29, 1987. Neither Lewallen nor White has appealed.

I.

[1] The first issue on appeal is whether the complaint states a cause of action against the state defendant under 42 U.S.C. § 1983. In Maine v. Thiboutot, 448 U.S. 1,

8, 100 S.Ct. 2502, 2506, 65 L.Ed.2d 555 (1980), the Supreme Court held that violation of a federal statute is cognizable under 42 U.S.C. § 1983. Since Thiboutot, however, the Court has delineated two exceptions to this general rule. Section 1983 does not encompass claims based on statutory violations if (1) Congress has foreclosed private enforcement in the enactment of the statute, Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 20-21, 101 S.Ct. 2615, 2626-27, 69 L.Ed.2d 435 (1981), or (2) Congress has not created enforceable rights in the relevant statutory provisions. Pennhurst State School & Hospital v. Halderman, 451 U.S. 1, 24-25, 101 S.Ct. 1531, 1544-44, 67 L.Ed.2d 694 (1981).

[2] The analysis here requires a determination of whether plaintiff has a "right" under a federal statute and if so

whether the federal statute precludes beneficiaries from seeking enforcement of those rights in a private cause of action. The Commissioner urges that Title IV-D of the Act does not afford plaintiff an enforceable right as defined by the Supreme Court in Pennhurst. We agree and therefore find it necessary only to discuss that issue.

The State contends that Title IV-D was enacted to recoup welfare expenditures, to ease the burden on the state and federal fiscs, to check the rising tide of families forced to resort to public assistance, and to reward states which maintain "cost-effective and efficient child support recovery operations." By achieving net savings for federal, state, and local governments' welfare appropriations Title IV-D will benefit the general public.

Although state participation in the Social Security Act itself is mandatory,

participation by a state in the IV-D program is voluntary. It is enacted pursuant to the spending power of Congress. Case law interpretation of Congress' power to legislate pursuant to the spending power has recognized that when Congress fixes the terms on which it shall disburse federal money to the state, it is much in the nature of a contract: in return for federal funds, the states agree to comply with federally imposed conditions. Pennhurst, 451 U.S. at 17, 101 S.Ct. at 1540, 67 L.Ed.2d at 707.[21] Pennhurst held that a funding statute that did not clearly condition the receipt of federal money on

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21 For cases holding Congress may fix the terms on which it shall disburse federal money to the states see Oklahoma v. CSC, 330 U.S. 127, 67 S.Ct. 544, 91 L.Ed. 794 (1947); King v. Smith, 392 U.S. 309, 88 S.Ct. 2128, 20 L.Ed.2d 1118 (1968); Rosado v. Wyman, 397 U.S. 397, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970).

the implementation of certain procedures did not create any enforceable rights.

> The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." . . . There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.

451 U.S. at 17, 101 S.Ct. at 1540, 67 L.Ed.2d at 707 (citations and footnote omitted).

In Cort v. Ash, 422 U.S. 66, 78, 95 S.Ct. 2080, 2088, 45 L.Ed.2d 26, 36 (1975), the Supreme Court enunciated four factors to determine whether a statute creates a private cause of action.

> In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff "one of the class for whose especial benefit the statute was enacted," . . . -- that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit,

> either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? (citations omitted).

The District of Columbia Circuit in Edwards v. District of Columbia, 821 F.2d 651 (D.C.Cir. 1987), affirmed the lower court's holding that public housing tenants did not have rights against constructive demolition of a housing project. In reaching its decision the court addressed the issue of when federal statutes create rights enforceable under § 1983 and discussed the Ash factors in reaching its conclusion.

> This question comprises the first of four factors used to determine whether to imply a cause of action from a federal statute . . . . Although now the second factor of the Cort test, which emphasizes a more direct and rigorous search for congressional intent, is given the greatest weight, see Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 106 S.Ct. 3229, 3234 n. 9, 92

> L.Ed.2d 650 (1986) (listing post-Cort Supreme Court cases stressing strict fidelity to congressional intent in implied cause of action field), the first factor of the Cort test does look to whether "the plaintiff [is] 'of the class for whose especial benefit the statute was enacted' . . . -- that is, does the statute create a federal right in favor of the plaintiff?" . . . Supreme Court cases that employed the Cort test initially emphasized this first factor, and concentrated particularly on whether or not the statute in question speaks in terms of specific right and duties. See, e.g., Cannon v. University of Chicago, 441 U.S. 677, 690 n. 13, 99 S.Ct. 1946, 1954-55 n. 13, 60 L.Ed.2d 560 (1979) ....
>
> We believe the analogy to be sound despite the Court's subsequent movement in implied cause of action jurisprudence away from Cort's first factor and toward its second factor. This movement toward an exclusive focus on whether Congress intended to create a private cause of action indicates the Court's growing realization that it ought not conflate the question of whether a statute creates rights with the question of whether it creates a private cause of action to enforce those rights. However, in a case like ours, where a separate congressionally created cause of action, § 1983, clearly exists, then the focus on whether the statute creates rights is appropriate, and the value of the first Cort factor is retained.

821 F.2d at 655 n. 4 (citations omitted).

Title IV-D does not create any enforceable right: it was not enacted for

the "especial benefit" of AFDC families. A Title IV-D program operates under a separate legislative and regulatory framework than that of a Title IV-A program. Title IV-A provides funds from the public treasure to support children in need. Title IV-D seeks to recover those funds and restore the Treasury balance by enforcement of support obligations owed by the absent parents of these children. The driving force behind the program is recovery of welfare payments and a parallel commitment to remove and keep families from the necessity of welfare dependence by establishing and enforcing support obligations. The legislative history indicates that in enacting Title IV-D Congress was primarily concerned with collecting child support in order to reduce the welfare rolls.

> The problem of welfare in the United States is, to a considerable extent, a problem of the non-support of children by their absent parents. Of the 11 million recipients who are now receiving Aid to Families With Dependent Children (AFDC), 4 out of every 5 are on the rolls because they have been deprived of the support of a parent who has absented himself from the home.
>
> The Committee believes that all children have the right to receive support from their fathers. The Committee bill, like the identical provision passed by the Senate (H.R. 3153) last year, is designed to help children attain this right, including the right to have their fathers identified so that support can be obtained. The immediate result will be a lower welfare cost to the taxpayer but, more importantly, as an effective support collection system is established fathers will be deterred from deserting their families to welfare and children will be spared the effects of family breakup.

S.Rep. No. 93-1356, 93rd Cong., 2d Sess., reprinted in [1974] U.S. Code Cong. & Admin.News 8133, 8145-46 (beginning paragraphs of "Section IV. Child Support").

The above-quoted language indicates the concern Congress felt over the welfare problem. Its reading indicates the goal of Title IV-D was to immediately lower the

cost to the taxpayer as well as to lessen the number of families enrolling in welfare in the future -- benefits to society as a whole rather than specific individuals. This reading is consistent with the concern evidenced by Congress in "Section II. Social Services" entitled Rapid rise in Federal funds for social services," and "Federal funds for social services limited in 1972," which precedes the section on child support.

Even before then, the legislative history preceding passage of Title IV-D indicates the concern Congress felt for increasing collection of support payments and thereby reducing the amount expended for welfare. The Report of the Committee on Finance of the United States Senate to accompany H.R. 3153 contains a section under "VII. Child Support (Sec. 151 of the bill)" entitled "incentives for Localities To Collect Support Payments." The language indicates

reimbursement of welfare costs is the incentive for states and localities to collect support payments.

> Under present law, when a State or locality collects support payments owed by a father, the Federal Government is reimbursed for its share of the cost of welfare payments to the family of the father; . . .
>
> In most States, however, local units of government, which would often be in the best position to enforce child support obligations, do not make any contribution to the cost of AFDC payments and consequently do not have any share in the savings in welfare costs which occur when child support collections are made. Since such a fiscal sharing in the results of support collections could be a strong incentive for encouraging the local units of government to improve their support enforcement activities, the bill would provide that if the actual collection and determination of paternity is carried out by local authority, the local authority would receive a special bonus based on the amount of any child support payments collected which result in a recapture of amounts paid to the family as AFDC.

S.Rep. No. 93-553, 93rd Cong., 1st Sess., Social Security Amendments of 1973, reprinted in Senate Miscellaneous Reports on Public Bills VII (emphasis added).

Title IV-D is also not a legal assistance program. AFDC recipients do not apply for nor request support enforcement services. They assign their child support rights to the state[22] and are required to cooperate (unless good cause for refusing to do so is determined to exist) in whatever legal action the state undertakes.[23] By assigning their child support rights in

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22 In return for this assignment of rights they receive AFDC aid. This quid pro quo is the mutual consideration which passes between the parties to the contract, and which renders it valid and binding.

23 "Cooperate" includes the following: (1) appearing at an office of the State or local agency or the child support agency as necessary to provide verbal or written information, or documentary evidence, known to, possessed by, or reasonably obtainable by the applicant or recipient; (2) appearing as a witness of judicial or other hearings or proceedings; (3) providing information, or attesting to the lack of information, under penalty of perjury; and (4) paying to the child support agency any support payments received from the absent parent after an assignment. 45 C.F.R. § 232.12(b).

return for AFDC aid, they give the states the opportunity to recoup the financial drain imposed by the welfare system on the state and federal treasures. As was its intent, as evidenced by the language of the statute and the legislative history, diminishing the welfare outlay benefits society as a whole. Consistent with that intent we cannot hold that Title IV-D creates enforceable rights under Pennhurst.

II.

The plaintiffs also sued the Secretary of the Department of Health and Human Services alleging a failure to enforce Title IV-D. That claim was brought either under the Administrative Procedure Act, 5 U.S.C. § 701 et seq.,[24] or under Title IV-D

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24 In Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 153, 90 S.Ct. 827, 830, 25 L.Ed.2d 184, 188 (1970) the court held the Administrative Procedure Act "grants standing to a person 'aggrieved by agency action within the meaning of a relevant statute.'"

itself. The district court found that the plaintiffs lacked standing to sue the Secretary and that no private cause of action could be implied under Title IV-D. Since we find that the appellant has no article III standing to sue the Secretary, we necessarily find that she cannot sue under the APA or Title IV-D.

[3] In order to have standing to sue under the APA, the plaintiffs must be injured in fact, and "the interest sought to be protected . . . [be] arguably within the 'zone of interests' to be protected or regulated by the statute." Clarke v. Securities Industry Assn., 479 U.S. 388, 394, 107 S.Ct. 750, 755, 93 L.Ed.2d 757, 766 (1987)[25] We need not, however,

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25 The zone of interest test is a guide for deciding whether, in view of Congress' evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to

[Footnote continued on following page]

consider whether the appellant is within the zone of interests protected by Title IV-D because we find that she lacks article III standing.

[4] Federal courts may only decide actual cases and controversies. The doctrine of article III standing determines whether the plaintiff is entitled to have the court decide the merits of a dispute. Allen v. Wright, 468 U.S. 737, 750-51, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556, 569 (1984). There is a core constitutional requirement that a plaintiff allege some

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[Footnote 25 continued from preceding page]

> complain of a particular agency decision. In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." Clarke, 479 U.S. at 399, 107 S.Ct. at 757, 93 L.Ed.2d at 769.

actual or threatened injury that is fairly traceable to the defendant and can be remedied by an order directed against the defendant. Id. In this case, the plaintiff alleges two distinct injuries: the loss of fifty dollars in support and the failure to establish her child's paternity. These injuries are sufficiently distinct to be judicially cognizable. 468 U.S. at 755-58, 104 S.Ct. at 3327-3330, 82 L.Ed.2d at 571-74 (claim of injury from government's noncompliance with law too general to be judicially cognizable but injury of diminished ability to receive integrated education is cognizable).

There must also be a nexus between the injury and the action of the defendant. The injury must both be caused by the defendant and be remediable by the defendant. In Allen v. Wright, the Supreme Court found that parents had no standing to challenge the Internal Revenue Service's

administration of guidelines concerning the tax status of racially discriminatory private schools. The Court held that the injury alleged by the plaintiffs (the reduced ability to receive an integrated education) was caused directly by the school's policy of discrimination and was only indirectly encouraged by the IRS policy. The Court held that the causal connection between the IRS's application of their guidelines was too attenuated to allow the plaintiffs to sue the IRS because granting relief against the IRS would not guarantee that the schools would forego their racially discriminatory practices. 468 U.S. at 759, 104 S.Ct. at 3328-29, 82 L.Ed.2d at 574; see also Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 42-44, 96 S.Ct. 1917, 1926-27, 48 L.Ed.2d 450 (1976) (claimed injury of reduction in hospital services not

sufficiently traceable to IRS revenue ruling to confer standing).

[5] In this case the appellant alleges the inaction by the Secretary has allowed the State of Georgia to ignore the Title IV-D requirements and has resulted in the injury to the plaintiffs. She relies on little more than the remote possibility, unsubstantiated by allegations of fact, that her situation might have been better had the defendant acted otherwise, and that her situation might improve were the court to afford relief. Appellant's injury is directly related to the absence of the fathers who have deserted their families to welfare -- not because she assigned her rights to support payments in return for AFDC aid. The court might add that had she been receiving support payments from the father it would not have been necessary for her to assign her support rights to the

State of Georgia. The assignment directly benefited her financially.

The nexus that the appellant alleges between the injury and the Secretary is attentuated at best since the injury is directly caused by a third party who is not a party to the lawsuit, namely the absent father. The attenuation and lack of redressability are clear since the appellant concedes that even rigorous enforcement of the child support laws does not guarantee that any father will be located and if so that any child support will be collected. The chain is even more attenuated, however, since the plaintiffs seek to sue the Secretary because nothing the Secretary can do will actually remedy the injury suffered by these plaintiffs. The only weapon of the Secretary is to withhold a portion of the federal funds if Georgia does not comply with the statute. It is far from certain that the withholding

of 1935, provides monetary payments from the state to financially needy families which include children deprived of parental support due to death, disability, or desertion. 42 U.S.C. § 601. States are not required to participate in the AFDC program, but if they choose to do so, they must operate a program which meets the statutory requirements in 42 U.S.C. § 602, as well as the provisions of detailed federal regulations promulgated by the Secretary. See 45 C.F.R. §§ 201, et seq. An explicit condition for the receipt of any federal AFDC money is that participating states have in effect a plan for child support collection which meets the standards set forth in Title IV-D of the Social Security ACt, 42 U.S.C. §§ 651, et seq. The state must operate a child support recovery program in substantial compliance with that plan. 42 U.S.C. § 602 (a)(27).

B. Title IV-D

The federal government has made efforts since 1950 to require that absent parents support their children. The Social Security Act Amendment of 1950, Ch. 809, § 321(b), 64 Stat. 549 (codified as amended at 42 U.S.C. § 602(a)(1)), required welfare workers to inform law enforcement officials of cases in which AFDC was needed due to abandonment by a parent. In 1967, Congress began requiring that states set up formal child support recovery programs, with the federal government providing half the funding. Social Security Act Amendment of 1967, Pub.L. No. 90-248 § 211, 81 Stat. 896 (codified as amended at 42 U.S.C. § 602(a)(17). However, despite the federal funding, state programs for child support recovery were near-complete failures and federal oversight was almost non-existent.

of the funds will result in more vigorous enforcement of the Georgia child support laws. It is clear that the plaintiffs "rely on little more than the remote possibility . . . that their situation might have been better had the [Secretary] acted otherwise, and might improve were the Court to afford relief." Warth v. Seldin, 422 U.S. 490, 507, 95 S.Ct. 2197, 2209, 45 L.Ed.2d 343 (1975).

We find that the appellant has failed to prove the challenged practices harm her and that she would benefit in a tangible way from the court's intervention. We find that Title IV-D was not enacted to confer a private cause of action on the appellant or any other person similarly situated. Where a federal statute provides its own comprehensive enforcement scheme, as here, the requirements of that enforcement procedure may not be by-passed by bringing suit directly. A ruling to the contrary

would open the door for multitudinous suits to be decided by federal court adjudication. It is not the function of the judiciary to direct the Secretary in the fulfillment of his role as overseer of the IV-D program. Such could not have been the intent of Congress.

> "Carried to its logical end, [appellants'] approach would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action; such a role is appropriate for the Congress acting through its committees and the 'power of the purse'; it is not the role of the judiciary, absent actual present or immediately threatened injury resulting from unlawful governmental action."
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> . . . . .
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> "[a] federal court . . . is not the proper forum to press" general complaints about the way in which government goes about its business.

Allen v. Wright, 468 U.S. at 759, 104 S.Ct. at 3329, 82 L.Ed.2d at 575-76.

AFFIRMED.

CLARK, Circuit Judge, dissenting:

I respectfully dissent from the majority's discussion of the plaintiff's right to sue the state defendants. I object both to the analysis employed in determining whether section 1983 provides a cause of action for the violation of Title IV-D and also to the majority's interpretation of Title IV-D. The state defendants have not established that Title IV-D precludes reliance on section 1983 by private plaintiffs to ensure that the state is in compliance with the statute.

Section 1983 expressly gives individuals the right to sue a state for its noncompliance with a federal statute. Maine v. Thiboutot, 448 U.S. 1, 8, 100 S.Ct. 2502, 2506, 65 L.Ed.2d 555 (1980). Although the Supreme Court has found two exceptions to this general rule, it recently held that the burden of proving

that private enforcement is precluded rests with the state.

> Under these cases, if there is a state deprivation of a "right" secured by a federal statute, § 1983 provides a remedial cause of action unless the state actor demonstrates by express provision or other specific evidence from the statute itself that Congress intended to foreclose such private enforcement.

Wright v. City of Roanoke Redevelopment Authority, 479 U.S. 418, 423, 107 S.Ct. 766, 771, 93 L.Ed.2d 781 (1987) (emphasis added). The burden is placed on the state actor because courts should not "lightly conclude that Congress intended to preclude reliance section 1983 as a remedy." Id. (quoting Smith v. Robinson, 468 U.S. 992, 1012, 104 S.Ct. 3457, 3469, 82 L.Ed.2d 746 (1984).

Instead of placing the burden of proof on the defendant in this case, the majority relies at least partially on case law concerning whether a private cause of action can be implied under a federal statute. In Cort v. Ash, 422 U.S. 66, 78,

95 S.Ct. 2080, 2088, 45 L.Ed.2d 26 (1975), the Supreme Court announced a strict four part test to determine whether Congress intended a private cause of action. Under the Cort test, however, the plaintiff must affirmatively prove that Congress intended to allow a private cause of action.

The majority's confusion of the two different lines of case law is extremely significant in this case. The factors considered under each test are similar. But, the fact that the burden of proof is on a the state in a section 1983 suit and on a plaintiff in an implied cause of action suit is of fundamental importance. Therefore to the extent that the majority's reliance on the implied right of action cases reflects a misunderstanding of the burden of proof on this issue, the foundation of the majority's analysis evaporates.

Furthermore, I dissent because the majority has misinterpreted Title IV-D and misread its legislative history. While no one can deny that the statute helps recover some of the money spent on AFDC, there is nothing in the statute or its legislative history which supports a finding that fiscal conservation was the goal of the statute. Rather, Congress made clear that it was concerned about the rising number of children who were abandoned by their fathers. The statute's clear intent to benefit the children and their families creates enforceable rights under section 1983.

I. Statutory Framework

A. Aid to Families with Dependent Children (AFDC)

AFDC (Title IV-A of the Social Security Act), is a federal-state cooperative effort administered by the states. The AFDC program, created by the Social Security Act

Therefore, in 1974, Congress enacted the Social Security Amendments of 1974 (the 1974 amendments), Pub.L. No. 93-647, 88 Stat. 2351 (codified as amended at 42 U.S.C. §§ 652, (et seq.). Designed "to assure an effective program of child support," the 1974 amendments were a radical revision of the previous law. S.Rep. No. 93-1356, 93rd Cong., 1st Sess., reprinted in 1974 U.S. Code Cong. & Admin.News 8133, 8148-8149. The 1974 amendment increased the federal matching funds from 50% to 75% as an incentive for the states to develop the appropriate programs (one of which was a Title IV-D agency). Similarly, incentive payments were available to any local governmental units which improved their enforcement of support orders. Noting that "the enforcement of child support obligations is not an area of jurisprudence about which this country can be proud," id., reprinted

in 1974 U.S. Code Cong. & Admin. News at 8146, the primary focus and intended beneficiary of the Act was the child and the family unit.

Before the 1974 amendments, any child support paid to the AFDC family was counted dollar-for-dollar in reducing the amount of the AFDC grant. The 1974 amendments provided that the state require individuals to assign to the state their right to receive child support payments as a condition of receiving the AFDC grant. Pub.L. No. 93-647, § 101(e)(5), 88 Stat. 2351 (codified at 42 U.S.C. § 602(a)(26)(A)). Thus the families were assured of receiving a set amount of money each month regardless of the personal vicissitudes of the absent parent.

After minor intervening amendments, a second sweeping set of changes in the child support enforcement requirements of the Social Security Act was instituted with the

Child Support Enforcement Amendments of 1984, Pub.L. 98-378 (the 1984 amendments), 98 Stat. 1305 (codified at 42 U.S.C. §§ 651, et seq.). In strengthening the Title IV-D requirements, Congress again focused on the needs and rights of families and children and the benefits to them of a strong, efficient, and effective child support recovery program. The 1984 amendments required the states to pass laws allowing for mandatory wage withholding and continuing garnishments, voluntary wage assignments, and the use of liens, 42 U.S.C. §§ 654(20), 666. In addition, more federal cooperation was extended through federal tax withholding availability, 42 U.S.C. § 664, and extending access to the federal Parent Locator Services, 42 U.S.C. § 663.

These amendments were intended to ensure that "all children in the United States who are in need of assistance in securing

financial support from their parents will receive assistance regardless of their circumstances." S.Rep. No. 98-387, 98th Cong., 2d Sess., at 1, reprinted in 1984 U.S. Code Cong. & Admin.News, 2397, 2397 (emphasis added). Congress mandated that Title IV-D child support recovery and paternity establishment services be provided to both AFDC and non-AFDC recipients. 42 U.S.C. §§ 651, 654(6).

Within days of the passage of the 1984 amendments, Congress also passed the Deficit Reduction Act of 1984 (DEFRA), Pub.L. No. 98-369 § 2640, 98 Stat. 1145. One of the provisions in DEFRA, section 2640, provided that, when a non-custodial or absent parent of children receiving AFDC makes support payments to the state, the first fifty dollars collected would be paid to the family without affecting its eligibility for assistance or decreasing

the amount of assistance it received. 42 U.S.C. §§ 657(b)(1), 602(a)(8)(A)(vi).

The law prior to 1988 required states, on penalty of the withholding of the AFDC funds, to have in effect and operate a child support enforcement program which meets the requirements of Title IV-D of the Social Security Act, 42 U.S.C. § 602(a)(27); see 45 C.F.R. §§ 302.12, 303.20. The state must undertake the establishment of paternity and the establishment and enforcement of support obligations for all AFDC children unless it is against the best interests of the child to do so. 42 U.S.C. § 654(4); 45 C.F.R. §§ 303.4(b), 303.5, 303.6. The state must provide Parent Locator Services, 42 U.S.C. § 654(8), and must comply with all other requirements and standards of the Secretary. 42 U.S.C. § 654(13). These services must be available for nonrecipients of AFDC as well. 42 U.S.C.

§§ 651, 654(6); 45 C.F.R. 302.33(a). In addition, the state is under an obligation to publicize the availability of such services. 45 C.F.R. § 302.30.

In 1988 Congress increased the obligations of the states. Pub.L. No. 100-485, 102 Stat. 2346 (1988). Of particular significance is that Congress directed the Secretary to promulgate regulations establishing the time frame within which states must respond to requests to enforce child support orders or establish paternity. Pub.L.No. 100-485, § 121, 102 Stat. 2351. This was to insure action on the part of the states-the particular action being sought by plaintiffs in this case.

II. The Section 1983 Claim

The plaintiffs brought this suit against the state defendants under 42 U.S.C. § 1983 alleging that Georgia has not complied with the requirements of Title IV-D. It is

clear that section 1983 encompasses claims based on purely statutory violations of federal law. Maine v. Thiboutot, 448 U.S. at 8, 100 S.Ct. at 2504-05 (1980). There are, however,

> "two exceptions to the application of § 1983 to statutory violations." . . . First, if Congress has foreclosed private enforcement of the statute in question in the enactment of the statute itself, then § 1983 is unavailable to enforce federal rights under the statute... For example, "[w]hen the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983." ... Second, if Congress has not created enforceable rights in the relevant statutory provision, there is no cause of action available under § 1983.

Silver v. Baggiano, 804 F.2d 1211, 1216 (11th cir. 1986) (quoting Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, 453 U.S. 1, 20-21, 101 S.Ct. 2615, 2626-27, 69 L.Ed.2d 435 (1981)).

A. Does Title IV-D Create Enforceable Rights?

In Pennhurst State School & Hospital v. Halderman, 451 U.S. 1, 101

S.Ct. 1531, 67 L.Ed.2d 694 (1981), the Supreme Court held that section 6010 of the Developmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U.S.C. § 6000 et seq., did not create substantive rights in favor of the disabled. Section 6010, which was called the "bill of rights" provision of the Act, provided that Congress made certain "findings": (1) that persons with developmental disabilities have a right to appropriate treatment, services, and rehabilitation; (2) that the treatment for a person with developmental disabilities should be designed to maximize the developmental potential of the individual and should be provided in the least restrictive setting; and (3) that the federal government and the states both have an obligation to assure that public funds are not provided to any institution which does not provide treatment appropriate to

1987) (mandatory language in Food Stamp Act creates rights enforceable under § 1983). Additionally, the clarity with which the conditions are set out may be an important consideration for the enforceability of conditions relies on the knowing and voluntary assumption of the conditions by the state. Pennhurst, 451 U.S. at 17-18, 101 S.Ct. at 1539-40; Edwards v. District of Columbia, 821 F.2d 651, 656 (D.C. Cir. 1987).[1] Furthermore, a review of the

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[1] In fact, the use of mandatory language alone may be sufficient to find the creation of enforceable federal rights. This court in Gonzalez v. Pingree, 821 F.2d at 1528, relied solely on the existence of mandatory language in 7 U.S.C. § 2020 to hold that individuals have an enforceable right to food stamps. At least one judge on the D.C. Circuit, however, has read Pennhurst more broadly. Edwards v. District of Columbia, 821 F.2d at 659 (opinion of Wald, J.). Judge Wald reads Pennhurst to require a statute to unambiguously create duties in language which "narrowly cabins the discretion of

[Footnote 1 continued on following page.]

legislative history of the statute and other traditional aids of statutory interpretation helps determine the legislative intent. Pennhurst, 451 U.S. at 23-28, 101 S.Ct. at 1543-45.

Unlike section 6010, the provision at issue in Pennhurst, Title IV-D is cast in mandatory terms. As a condition of receiving matching AFDC funds, states "must" have and operate a Title IV-D plan. 42 U.S.C. § 602(a)(27). Moreover, Title IV-D requires that state child support

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[Footnote 1 continued from preceding page]

officials, and by the same terms, secures rights to a specific class of people." Id. at 656. This expansive reading of Pennhurst may be precluded by the Supreme Court's interpretation of Pennhurst in School Board of Nassau County v. Arline, 480 U.S. 273, 286 n. 15, 107 S.Ct. 1123, 1130 n. 15, 94 L.Ed.2d 307 (1987), and Wright v. City of Roanoke Redevelopment and Housing Authority, 479 U.S. 418, 107 S.Ct. 766, 93 L.Ed.2d 781 (1987); see Edwards, 821

[Footnote 1 continued on following page]

plans "must provide" that the state "will undertake" to "establish the paternity" of a child born out of wedlock and "secure support for such child from his parent" unless it is against the best interests of the child to do so. 42 U.S.C. § 654(4)-(5). In addition, Title IV-D requires

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[Footnote 1 continued from preceding page]

F.2d at 668 (Wills, J. dissenting). In Arline, the Court made clear that Pennhurst turned on the fact that the language of the statute was precatory not mandatory. 480 U.S. at 286 n. 15, 107 S.Ct. at 1130 n. 15. Similarly, in Wright, the Court summarily dismissed the argument that the mandatory language concerning rent ceilings in the Fair Housing Act did not create enforceable rights. 479 U.S. at 432-35, 107 S.Ct. at 775-76.

The majority's reliance on Judge Wald's opinion in Edwards, therefore, is troubling. Besides the flawed reasoning on the burden of proof pointed out before, supra, Edwards represents a reading of Pennhurst that has not been adopted by the Supreme Court or this court. Nevertheless, even under the majority's reading of Pennhurst, I believe the statute creates enforceable rights since the statute clearly imposes obligations on the states for the benefit of families with absent parents.

states to notify families "at least annually" of the amount of child support collected in their behalf, 42 U.S.C. § 654(5), and give to families the first fifty dollars in child support collected each month, 42 U.S.C. §§ 602(a)(8)(A)(vi), 657(b)(1). The section also expressly conditions the receipt of federal funds on the state submitting a IV-D plan. 42 U.S.C. § 602(a)(27). Additionally, a subsequent failure to substantially comply with Title IV-D results in the mandatory withholding of a percentage of matching AFDC funds unless the state submits corrective action for achieving compliance. 42 U.S.C. § 603(h). The mandatory nature of the conditions therefore set this statute apart from the one considered in Pennhurst. Title IV-D is further distinguishable from 42 U.S.C. § 6010 interpreted in Pennhurst because it does not merely express a general

the needs of the person or does not meet federal standards.

The Court found that Congress did not intend to create a substantive right to appropriate treatment in the least restrictive environment. 451 U.S. at 32, 101 S.Ct. at 1547. The Court considered both the language of the statute and the legislative history and concluded that the Act was meant to "assist" the states in improving the care and treatment of the mentally disabled. Id. at 18, 101 S.Ct. at 1540. In determining Congressional intent, the Court concluded that section 6010 was merely a "general statement of 'findings'" and therefore "too thin a reed" to support the notion that it created substantive rights. Id. 101 S.Ct. at 1541. The Court also reasoned that section 6010 did not impose any conditions on states for receipt of federal funds and that federal regulations explicitly provided that

federal funds could not be withheld for failure to comply with section 6010. Finally, the Court noted that the relatively small amount of federal money given to states confirmed that Congress had a limited purpose in enacting section 6010. Id. at 24, 101 S.Ct. at 1543.

In determining whether a statute creates enforceable rights, therefore, the key to the inquiry is the intent of the legislature. The question focuses on whether Congress intended to mandate state compliance with specific conditions or whether it merely intended to encourage state behavior. This intent is discerned from the plain language of the statute, for Congress must explicitly set out the conditions placed on federal aid. The use of mandatory rather than precatory language is an important factor. Pennhurst, 451 U.S. at 20, 101 S.Ct. at 1541; see Gonzalez v. Pingree, 821 F.2d 1526, 1528 (11th Cir.

preference for more vigorous enforcement of support orders; rather it requires states to adopt specific procedures for enforcement. In addition to requiring the state to create a system to locate delinquent parents, the states must allow for judicial determination of paternity until child reaches eighteen. 42 U.S.C. § 666(a)(4). The states must also adopt laws providing for expedited procedures for obtaining and enforcing support orders. 42 U.S.C. § 665(a)(2). Additionally, and perhaps most significantly, the states are required to pass laws creating specific remedial devices to ensure more effective enforcement of the child support awards. States are required to establish a system of wage withholding, reduction in tax returns of a delinquent parent, the use of liens against real and personal property, the posting of security or a bond, and procedures for reporting significant

arrearages to credit reporting agencies. 42 U.S.C. § 666(a)(1)-(7). 45 C.F.R. § 302.70[2] Although the use of the remedial devices other than wage withholding are somewhat discretionary to the State, the wage withholding provisions and the establishment of an expedited system of obtaining and enforcing the support obligations are mandatory. Indeed, section 666(b) explicitly sets out the criteria a wage withholding plan must contain. The specificity of these requirements belies any comparison with the generalized

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2 The regulations are even more specific. The state must maintain an effective system to identify delinquencies in support payments within thirty days and must enforce those delinquencies through a contempt order, garnishment proceedings, proceedings against real property or the other remedial devices listed in the statute. 45 C.F.R. § 303.5.

"findings" in section 6010 in Pennhurst[3] credulity to argue that participating states" did not know of their obligations under those sections.

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[3] Section 6010, at issue in Pennhurst, was interpreted to be merely a recommendation by Congress as to the appropriate treatment of mentally retarded individuals. The Supreme Court based its finding that the section did not create enforceable rights on a comparison of section 6010 to other sections (sections 6011, 6033) which did expressly condition receipt of funds on compliance with those sections of the statute. 451 U.S. at 26, 101 S.Ct. at 1544.

A similar comparison can be done in this case. On the one hand, the sections of the statute at issue (sections 654, 666) expressly condition receipt of federal money on compliance with specific conditions. There are, however, two sections of the Act which more closely resemble section 6010 in Pennhurst and may not create enforceable rights. First, the 1984 amendments contained a section entitled "Sense of Congress" in which Congress made "findings" that the states should focus on the important issues of child support, custody and visitation because of the importance of these issues to the health of "our

[Footnote 3 continued on following page.]

The state attempts to contradict the language in Title IV-D by arguing that the legislative history indicates that in enacting Title IV-D Congress was primarily concerned with collecting child support in

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[Footnote 3 continued from preceding page]

nation's children." H.Cong.Rep. No. 98-925, 98th Cong.2d Sess. at 59, reprinted in 1984 U.S.Code Cong. & Admin.News at 2477. That section closely resembles section 6010 in Pennhurst because it merely encourages the states to reconsider their approach to the issue of family law. Section 667 of the amended act also resembles section 6010 in Pennhurst. Section 667 requires that states establish uniform guidelines with respect to determinations of child support. Although the language of the section mandates the creation of guidelines as a condition for receipt of federal funds, under the majority's reading of Pennhurst the fact that no specific guidelines were mentioned would require a holding that section 667 does not create enforceable rights. But see supra n. 1. Comparing the precatory language of the sense of Congress section and the lack of specific direction in section 667 to the clear language of sections 654 and 666, it is clear language of sections 6545 and 666, it is clear that the latter sections create enforceable rights.

order to reduce the welfare rolls. Nothing could be further from the truth. In 1974 the Senate Finance Committee stated that "[t]he immediate result [of Title IV-D] will be a lower welfare cost to the taxpayer, but, more importantly, as an effective support collection system is established fathers will be deterred from deserting their families to welfare and children will be spared the effects of family breakup." S.Rep. No. 93-1356, reprinted in 1974 U.S.Code Cong. & Admin. News at 8146 (emphasis added).

Because Title IV-D child support services are available to both AFDC and non-AFDC families, Congress' purpose was not simply to save money on welfare. Title IV-D is unambiguously phrased in terms of benefit to children and families. Title IV-D was passed

> [f]or the purpose of enforcing the support obligations owed by absent parents to their children and the spouse (or former spouse) with whom such

> children are living, locating absent parents, establishing paternity, obtaining child and spousal support, and assuring that assistance in obtaining support will be available under this part to all children (whether or not eligible for aid under part A) for whom such assistance is requested[.]

42 U.S.C. § 651 (emphasis added). The legislative history echoes this purpose. In recommending the passage of Title IV-D, the Senate Finance Committee stated that "all children have the right to receive support from their fathers" and that Title IV-D was "designated to help children attain this right, including the right to have their fathers identified so that support can be obtained." S.Rep. No. 93-1356, reprinted in 1974 U.S. Code Cong. & Admin. News at 8146 (emphasis added).

Moreover, nothing cited by the majority contradicts this expression of Congressional intent. The majority finds the motivation of the Congress to be fiscal conservation based on two general discussions of the monetary benefit of the

programs and two subtitles to portions of the Senate report. The majority does not evaluate the Senate report as a whole. The report did note that welfare costs had risen, but the report nowhere stated that the bill was intended to reduce welfare costs.[4] To the contrary, the 1974 amendments increased the federal share of Social Security funding from 50% to 75%. Indeed, the clear intent was to provide more services to the public, since the report made clear that the increase in

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[4] Indeed the section which describes the rise in welfare costs merely sets out the background for the bill. The Senate Report explained that in light of the rise in federal spending on welfare, the regulations promulgated by HEW were inadequate. The purpose of the bill overall (since the bill applied to the entire Social Security Act), therefore, might be said to be a clarification or refinement of the requirements for the programs. S.Rep. No. 93-1356, reprinted in 1974 U.S. Code Cong. & Admin. News at 8135-36.

funding was to go to new services and was not to replace the state funds for existing services. S.Rep.No. 93-1356, reprinted in 1974 U.S. Code Cong. & Admin. News at 8134.[5]

Additionally, nothing in the 1984 amendments reveals an intent merely to recover the cost of AFDC.[6] The amendments

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5 This case is further distinguished from Pennhurst in that the Court in Pennhurst relied on the fact that the small amount of money appropriated by Congress contradicted the argument that the statute intended to order massive expenditures on the part of the state. In this case, Congress actually raised the already substantial federal funding in order to assure that the states would comply with Title IV-D.

6 I do not deny that the fact that support enforcement reimburses the state and federal government for AFDC expenditures is an advantage to this Act. However, as the House Committee on Ways and Means stated in recommending adoption of the Child Support Enforcement Amendments of 1984, the success of Title IV-D could not be measured in "terms of AFDC savings due to collections on behalf of recipients" because the "objectives behind the program are greater than merely recouping federal and state AFDC expenditures." H.R.Rep. No. 98-527, 98th Cong., 1st Sess., at 2930.

were passed because the states had not complied with existing law. The Senate therefore made the requirements more specific for the states and increased federal monitoring. The increased specificity of the conditions on the receipt of federal funds supports a finding that the statute creates enforceable rights.[7] The increased monitoring by the federal government is not relevant to the question of whether the statute creates rights, but rather to the second exception under Maine v. Thiboutot. Federal supervision is relevant to the question of

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[7] After this case was briefed, Congress passed a law revamping the existing welfare laws. Of significance to this case is that Congress required the states to adopt child support guidelines which will presumptively determine the amount of an award. Pub.L. No. 100-485, § 103, 102 Stat. 2346 (1988). In addition, wage withholding must be automatic in most new support awards. Pub.L. No. 100-485, § 101, 102 Stat. 2343. These new requirements support a finding that Title IV-D creates enforceable rights.

whether, despite the creation of rights, the statute shows an intent to preclude private enforcement through section 1983. That issue is discussed infra.

The defendants also argue that the statute creates no enforceable rights because it only requires the state to operate an effective system for recovering child support obligations and establishing paternity. The defendants claim that the statute does not create a right to actually receive support or a determination of paternity. But that is not what the plaintiffs are claiming. This case is not about whether Mr. Brown pays Mrs. Brown the child support he owes, but rather whether the State of Georgia has complied with the requirements of Title IV-D and established a system of identifying absent parents and enforcing their support obligations. The State of Georgia agreed to establish such procedures when it took the federal AFDC

money. The statute in mandatory language created an obligation on the part of the state to establish a certain procedure as already discussed.

The defendants may also be arguing that the plaintiffs should not be able to sue to force compliance with Title IV-D because the noncompliance does not affect them. The argument is that since the plaintiffs have assigned their right to support to the state, the failure to set up a recovery system under Title IV-D only hurts the state. This argument ignores several vital aspects of the statute. First, a family does receive the first fifty dollars in support collected. Second, non-AFDC recipients who wish to make use of a Title IV-D program certainly are affected by Georgia's failure to comply with the statute. Finally, the failure to create a system of establishing paternity clearly impacts on the AFDC and non-AFDC

recipients. The state argues that the establishment of paternity only serves to help the state get reimbursed for AFDC payments. This argument ignores the benefits to the child of a paternity determination. These benefits include the possibility of establishing an interpersonal or economic relationship with the father, increased access to family medical histories and the possibility of establishing inheritance rights or eligibility for Social Security benefits.

The plain language of the statute clearly conditions state receipt of federal funds on the establishment of specific state programs. The mandatory language of the statute as well as the specificity of the conditions clearly distinguish this case from Pennhurst. I would hold that Title IV-D does create rights which are cognizable under section 1983. Therefore, I must proceed to consideration of whether

the statute itself forecloses section 1983 as a remedy.

B. Has Congress Foreclosed Private Enforcement of Title IV-D?

On two occasions the Supreme Court has found that Congress intended to foreclose section 1983 actions for statutory violations. In Middlesex County Sewerage Auth. v. National Sea Clammers, 453 U.S. 1, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981), the plaintiffs filed a section 1983 action alleging violations of the Federal Water Pollution Control Act (FWPCA). The Supreme Court held that the existence of statutory remedies in the FWPCA indicated that Congress did not intend to preserve section 1983 actions for violations of the FWPCA. The remedies under the FWPCA included two citizen-suit provisions, the ability of the EPA administrator to issue compliance orders and commence suits under the FWPCA, and the ability of interested persons to

seek judicial review of particular actions by the EPA administrator. Id. at 13-15, 20-21, 101 S.Ct. at 2622-23, 2626-27.

In Smith v. Robinson, 468 U.S. 992, 104 S.Ct. 3457, 82 L.Ed. 746 (1984), the plaintiffs brought a section 1983 action alleging violations of the Education of the Handicapped Act (EHA). The Supreme Court held that the EHA's elaborate procedural mechanisms indicated that Congress had foreclosed the section 1983 action. In addition to the Secretary's ability to withhold funds from state education agencies, the statute guaranteed written notice to parents of any decisions by the local education authorities, state administrative review of decisions by the local education authorities and judicial review of the administrative proceedings. Id. at 1011, 104 S.Ct. at 3467-68. In addition, the statute envisioned the cooperation of parents and local education

authorities in formulating individualized education programs for handicapped children and required local education authorities to review and, if necessary, revise each child's education program at least once a year. The Court also noted that there was no indication in the legislative history that Congress intended to allow circumvention of the EHA's administrative procedures. Id. at 1012-13, 104 S.Ct. at 3469.

Last year, in Wright v. City of Roanoke, 479 U.S. 418, 107 S.Ct. 766, 93 L.Ed.2d 781 (1987), the Supreme Court held that Congress had not foreclosed section 1983 actions for violations of the Housing Act. The plaintiffs in Wright, who were low-income tenants, brought a section 1983 suit claiming that a public housing authority (PHA) had overbilled them for utilities in violation of the Brooke Amendment to the Housing Act. The Court found that there

was no express indication that HUD enforcement was exclusive, but there were indications that private actions were anticipated. First, although the Housing Act provided for grievance procedures within the PHAs and administrative appeals, there was no procedure by which tenants could complaint to the Department of Housing and Urban Development (HUD) about the PHAs, and HUD itself had not reviewed the PHA grievance procedures. Id., 107 S.Ct. at 772. Second, the Housing Act did not establish private judicial remedies such as existed in Sea Clammers and Smith. Id. at 773. Third, although the tenants were able to sue in state court, that remedy did not prevent resort to § 1983. Id. at 773-74. Fourth, HUD's authority to audit the PHAs, enforce annual contribution contracts, and cut off federal funds was a generalized power which was "insufficient to indicate a congressional intention to

foreclose section 1983 remedies." The audits took place every eight years, and there were no other mechanisms to enable HUD to effectively oversee the performance of the country's 3,000 PHAs. Id. at 773.

In Gonzalez v. Pingree, 821 F.2d 1526 (11th Cir. 1987), this court addressed whether Congress had foreclosed section 1983 actions for violations of the Food Stamp Act. Like the Housing Act in Wright, the Food Stamp Act did not provide for private judicial enforcement. Id. at 1529. The Gonzalez court, relying on Wright, held that a section 1983 action could be brought despite the availability of state administrative procedures, the power of the Secretary of Agriculture to enforce state compliance with the Food Stamp Act by withholding funds or seeking injunctive relief, and the possibility that recipients could invoke the enforcement powers of the administering federal agency Id. at 1529-

30. The Gonzalez court also noted that the legislative history of the Food Stamp Act evidenced a congressional purpose to leave the avenues of private judicial enforcement open. Id. at 1530.

Title IV-D is devoid of any indication that Congress intended to foreclose a section 1983 action. Unlike the federal acts at issue in Sea Clammers and Smith, but like the federal acts in Wright and Gonzalez, Title IV-D does not provide for private judicial or administrative remedies such as citizen suits or judicial review of administrative procedures. The only enforcement action contemplated by Title IV-D is the federal government's audit and withholding of funds if the state is not "complying substantially" with federal law. Although this statute does require more frequent audits than the Housing Act at issue in Wright (once every year instead of once every eight years), this difference is

not determinative of the issue of private enforcement. The Secretary's withholding of funds is the only avenue available in the statute to remedy the violations. Federal oversight is not sufficient in and of itself to preclude private enforcement, for every federal statutory scheme which involves federal grants to the states necessarily involves federal supervision. See Rosado v. Wyman, 397 U.S. 397, 420, 90 S.Ct. 1207, 1222, 25 L.Ed.2d 442 (1970) (AFDC case) ("We have considered and rejected the argument that a federal court is without power to review state welfare provisions or prohibit the use of federal funds by the State in view of the fact that Congress has lodged in the Department of HEW the power to cut off federal funds for noncompliance with statutory requirements."). Indeed section 1983 has long been used as a vehicle to bring claims of violations of the Social Security Act and

AFDC in particular. See Maine v. Thiboutot, 448 U.S. at 4, 100 S.Ct. at 2505 (listing cases); see also Lynch v. Dukakis, 719 F.2d 504, 510-11 (1st Cir. 1983) (Title IV-E); Bennett v. White, 671 F.Supp. 343, 345-48 (E.D. Pa. 1987) (Title IV-D); Wilcox v. Petit, 649 F.Supp. 685, 687-88 (D.Me.1986) (Title IV-D); Carter v. Morrow, 562 F.Supp. 311 (W.D.N.C. 1983) (Title IV-D).

Finally, nothing in Title IV-D's legislative history can be construed as congressional reluctance to allow section 1983 actions. In 1977 former AFDC recipients in Georgia brought an action against state and federal authorities challenging the collection and distribution of child support payments following the termination of AFDC benefits. See Seagrams v. Harris, 629 F.2d 385 (5th Cir.

1980).[8] Soon thereafter, Senator Nunn proposed an amendment to Title IV-D which supported the challenged practices. He

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[8] The question of whether section 1983 could serve as a basis for a claim of a violation of Title IV-D was not addressed by the court in Seagraves. Although there was an issue of whether there was a jurisdictional base for the claim in Seagraves, that issue was solved by allowing the plaintiffs to amend their complaint to add a constitutional claim. Before the amendment, the plaintiffs sought to establish jurisdiction under 28 U.S.C. § 1343 by alleging that the state's violation of the Social Security Act violated the Supremacy Clause. 629 F.2d at 389. That basis was not appropriate since the Supreme court had held in Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 99 S.Ct. 1905, 60 L.Ed.2d 508 (1979), that section 1343 did not confer subject matter jurisdiction for violations of the Supremacy Clause. The next year, however, the Court held in Maine v. Thiboutot, 448 U.S. at 8, 100 S.Ct. at 2506, that violations of the Social Security Act could be brought under § 1983 and that the jurisdictional base is 28 U.S.C. § 1331. Although not discussed in Seagraves, it is clear that subject to the two exceptions to Thiboutot, claims of violations of federal statute by state actors brought under § 1983 are cognizable in federal court.

referred specifically to the Georgia lawsuit without questioning its propriety. See 123 Cong. Rec. S33865 (Oct. 17, 1977). Senator Nunn's amendment was enacted into law verbatim. Pub.L. 95-171, § 11, 91 Stat. 1357 (1977). This action cannot be consistent with an intent to foreclose section 1983 actions for violations of Title IV-D.

III. Conclusion

There can be no doubt that section 1983 can be used to challenge violations of Title IV-D. The state has failed to carry its burden of demonstrating that Congress intended to foreclose section 1983 actions, and it is clear that families with absent fathers are the intended beneficiaries of Title IV-D and have enforceable rights to effective paternity determinations and child support enforcement procedures.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 87-8345

JOY D. WEHUNT,

Plaintiff,

versus

JAMES G. LEDBETTER, in his official capacity as Commissioner of the Georgia Department of Human Resources, and LOUIS SULLIVAN,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion September 26, 11 Cir., 1989, ____ F.2d____).

Before FAY AND CLARK, Circuit Judges, and GUIN*, District Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and the court having been polled at the request of one of the members of the court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

ENTERED FOR THE COURT:

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United States Circuit Judge

* Honorable J. Foy Guin, Jr., U.S. District Judge for the Northern District of Alabama, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOY D. WEHUNT, et al.,	)	
	)	
Plaintiffs,	)	CIVIL ACTION
	)	NO. C85-2891
vs.	)	
	)	
JAMES G. LEDBETTER, et al.,	)	
	)	
	)	
Defendant.	)	
	)	

ORDER

This action is before the court on the defendants' separate motions to dismiss, the plaintiffs' motion for leave to file a third amended complaint, and the plaintiffs' motion for class certification. All but the motion for class certification will be GRANTED.

I. STATUTORY BACKGROUND.

The Child Support Enforcement Act was adopted in 1974 as Title IV-D of the Social Security Act, 42 USC §§ 651 et seq. (hereinafter "Title IV-D"), "[f]or the

purpose of enforcing the support obligations owed by absent parents to their children and the spouse (or former spouse) with whom such children are living, locating absent parents, establishing paternity, obtaining child and spousal support, and assuring that assistance in obtaining support will be available under this part to all children ... for whom such assistance is requested." 42 USC § 651. Under Title IV-D, as passed in 1974 and as amended in 1984, [1] "[b]asic responsibility for child support and establishment of paternity is left to the States, but the Federal Government also plays a major role in monitoring and evaluating State programs, providing technical assistance, and, in certain instances, in undertaking to give direct assistance to the States in locating absent parents and obtaining

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[1] August 16, 1984, Publ. L. 98-378, § 2, 98 Stat. 1305.

support payments from them." S.Rep. No. 387, 98th Cong., 6-7 reprinted in 1984 U.S. Code Cong. & Admin. News 2397, 2402-03.

The Act requires the Department of Health and Human Services to set up a separate organizational unit under the control of a person designated by and reporting directly to the Secretary to carry out the Secretary's responsibilities in child support enforcement. The Secretary has the responsibility of establishing the standards for state programs which he determines to be necessary to assure that the programs will be effective. In addition, he is required to establish minimum organizational and staffing requirements for state child support agencies. The Secretary is also required to review and approve state plans and to evaluate the implementation of state programs to determine whether they are in conformity with the federal requirements.

He must conduct annual audits of state programs to determine whether the actual operation of the program in each state conforms to the federal requirements and must impose a penalty if he finds non-compliance. The statute also requires the Secretary to provide technical assistance to the states to help them establish effective systems for collecting child and spousal support and establishing paternity.

Under the Child Support Enforcement Program, states are given access to the federal courts to enforce court orders for support. Another tool made available to the states by the statute is the Internal Revenue Service, through which, under certain circumstances, collections may be made on behalf of both AFDC and non-AFDC families. The statute also requires the Secretary to establish and operate a Federal Parent Locator Service to be used to find absent parents in order to enforce

child support obligations. Another major responsibility of the Secretary is to approve applications by the states for federal matching funds to be used to establish automatic data processing and information retrieval systems designed to assist in the administration of a child support program. Finally, the Secretary has the responsibility of assisting states in establishing adequate reporting procedures, and in providing the Congress with an annual report on all activities undertaken as part of the child support program.

The states are required to have state plans which set forth their functions and responsibilities. Each plan must provide that the state will undertake to secure support for an AFDC child whose rights to support have been assigned to the state, such assignment being a condition of eligibility for AFDC benefits. The state

plan must also provide for the establishment of paternity for AFDC children. With respect to non-AFDC families, the state must make available the child support collection and paternity determination services which are provided under the plan for AFDC families. Each state must attempt to enter into cooperative arrangements with appropriate courts and law enforcement officials to assist the IV-D agency in administering the program. The Act requires the IV-D agency to establish a State Parent Locator Service to locate absent parents using all sources of information available to the state as well as to the Federal Parent Locator Service. The agency must also maintain full records of collections and disbursements and have an adequate reporting system. In order to facilitate the collection of support in interstate cases, the state must cooperate with other

states in establishing paternity, locating absent parents, and in securing compliance with an order issued by another state. Finally, the statute requires each state to comply with any other requirements and standards that the Secretary determines to be necessary to the establishment of an effective support program.

The federal government pays seventy percent of state and local administrative costs for services to both AFDC and non-AFDC families on an open-end entitlement basis.[2] In addition, ninety percent federal matching is available on an open-end entitlement basis to states that elect to establish an automatic data processing and information retrieval system. Collections made on behalf of AFDC families

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2 The federal share will drop to sixty-eight percent in 1988 and to sixty-six percent in 1990. 42 USC § 655.

made on behalf of AFDC families are used to off-set the cost to the federal and state governments of welfare payments made to the family. The amounts retained by the government are distributed between the federal and state governments according to the proportional matching share which each has under a state' AFDC program. As an incentive to encourage state and local governments to participate in the program, the law provides for a payment equal to twelve percent of collections made on behalf of AFDC families. These incentive payments ar deducted from the federal share of collections and are to be retained by the level of government making the collections.

II. PROCEDURAL BACKGROUND.

This action was originally filed by plaintiff Joy D. Wehunt in May of 1985. Defendant Ledbetter ("the state defendant")

is sued in his official capacity as Commissioner of the Georgia Department of Human Resources. Defendant Bowen ("the federal defendant") is sued in his official capacity as the Secretary of the United States Department of Health and Human Services. Plaintiff Wehunt sought declaratory and injunctive relief for violations of her civil rights under Title IV-A (42 USC §§ 601 et seq.) and Title IV-D (§§ 651 et seq.). The Title IV-A program provides federal funds to participating states for the provision of financial assistance to families whose available income and resources are insufficient to meet the costs of necessary living expenses.

Wehunt alleged that the state defendant had failed in his obligations under the Social Security Act to establish paternity on her child's behalf, to collect child support, and to locate the absent

parent of her child.[3] Wehunt alleged that the federal defendant had failed in his duty to oversee the operation of state plans under Titles IV-A and IV-D and to insure that the state defendant complied with the conditions of participant in the AFDC program. Wehunt sought a declaration that the acts and practices of the state defendant in failing to initiate paternity and enforcement of support proceedings on her behalf and of the federal defendant in failing to review properly or adequately and to monitor the State of Georgia's operation of the child support enforcement

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[3] Wehunt also alleged that the state defendant had adopted a definition of "child support" that imposed requirements beyond those of Title IV-A, with the result that amounts paid to her by the absent father of her child had been labeled mere "contributions" and not "child support" and thus deprived her of the $50 child support disregard. That claim, however, is not at issue in these motions. The parties have informed the court that they expect to present a consent order on the Title IV-A claim in the near future.

program and the AFDC program subjected her to a deprivation of her rights under Titles 4-A and 4-D. She also sought a permanent injunction requiring the state defendant to initiate and conclude paternity proceedings on behalf of her child and to initiate and conclude recovery of child support proceedings on behalf of the child. She sought a preliminary and permanent injunction requiring the federal defendant properly to review, evaluate, and supervise the state defendant's actions under Titles IV-A and IV-D. Finally, Wehunt requested the court to retain jurisdiction over the defendants until the court was satisfied that the practices, policies, and omissions at issue were corrected and would not recur.

On October 23, 1985, the court granted the motion of Brenda White and Gwendolyn Brown to intervene as plaintiffs and to file a first amended complaint adding White

and Brown as plaintiffs and setting forth new class action allegations. Shortly thereafter, the plaintiffs moved for class certification and for leave to file a second amended complaint to clarify the class allegations. Leave to file the second amended complaint was granted. At a status conference on April 23, 1986, the court deferred the plaintiffs' motion for class certification pending further briefing on alternative classes, directed that all Rule 12 motions be filed within thirty days, stayed all discovery, and stated an intention to extend discovery four to six months from the ruling on the class certification if the case survived the Rule 12 motions. The plaintiffs subsequently submitted a re-definition of the class. Currently, in addition to the defendants' motions to dismiss, the plaintiffs' motion for class certification and a motion by the plaintiffs for leave to

file a third amended complaint, stating claims under the Administrative Procedure Act and for mandamus relief, are pending.

III. MOTIONS TO DISMISS.

A. Whether the Plaintiffs Have a Cause of Action against the State Defendant under 42 USC § 1983.

In Maine vs. Thiboutot, 448 U.S. 1 (1980), the Supreme Court concluded that 42 USC § 1983 authorizes suits to redress violations by state officials of rights created by federal statutes. The plaintiffs argue that the present case fails within the scope of Maine vs. Thiboutot because it is a suit by a private party claiming that a federal statute has been violated under color of state law, causing an injury. However, as the Supreme Court noted in Middlesex County Sewerage Authority vs. National Sea Clammers Association, 453 U.S. 1 (1981) ("Sea Clammers"), there are two exceptions to the

application of section 1983 as statutory violations. In deciding whether the plaintiffs have a cause of action against the state defendant under section 1983, the court must determine (1) whether Congress foreclosed private enforcement of Title IV-D in its enactment, and, if not, (2) whether Title IV-D creates enforceable "rights" under section 1983. Id. at 19.

The first question, then, is whether Congress has foreclosed private enforcement of Title IV-D. The conclusion that Congress did so, and that the plaintiffs' action against the state defendant must therefore be dismissed, is inescapable in light of the Eleventh Circuit's recent decision in Brown vs. Housing Authority of City of McRae, 784 F.2d 1533 (11th Cir. 1986). In Brown, public housing tenants brought an action against the City Housing Authority and the Secretary of Housing and Urban Development for alleged violations of

the United States Housing Act of 1937, 42 USC §1437(a), which limits the rent that can be charged to public housing tenants to a fixed portion of their income. The theories of recovery in Brown were identical to those asserted here: The plaintiffs argued that the local housing authority was liable for violations of the Housing Act under section 1983 and that HUD was liable for failing to monitor properly and to obtain compliance under an implied right of action in the Housing Act. Both claims were dismissed for failure to state a claim and the Eleventh Circuit affirmed the dismissal.

In analyzing the section 1983 claim in Brown, the Eleventh Circuit held that Congress had foreclosed private enforcement of the Housing Act by designating HUD, rather than the tenants themselves, as the enforcer of the Act. Relying on two Fourth Circuit decisions, Wright vs. City of

Roanoke Redevelopment and Housing Authority, 771 F.2d 833 (4th Cir. 1985), cert. granted, 106 S.Ct. 848 (1986), and Phelps vs. Housing Authority, 742 F.2d 816 (4th Cir. 1984), the Eleventh Circuit found support for its conclusion in the following: (1) "The obvious lack of any affirmative statutory language indicating a Congressional intention to allow private remedial suits"; (2) the fact that the Housing Act was "replete with indication of an intention to entrust HUD with the mean s and the responsibility for effective enforcement"' and (3) the fact that HUD regulations promulgated pursuant to the Housing Act created procedures by way of which tenants could air their utility allowance grievances. Brown, 784 F.2d at 1537.

The parallels to this case and to Title IV-D are obvious. First, as the plaintiffs have conceded, Response at 38,

there is no "affirmative statutory language indicating a Congressional intention to allow private remedial suits" in Title IV-D's child support enforcement provisions.

Second, the Housing Act and Title IV-D are equally "replete with indications of an intention to entrust [the federal agency] with the means and the responsibility for effective enforcement": The primary enforcement mechanism to which the court pointed in Brown was the Annual Contributions Contract executed between HUD and each local housing authority which required that the local authorities comply with the Housing Act and HUD regulations. HUD could enforce compliance with the Annual Contributions Contract "by the most drastic possible means: termination of the federal subsidies under the contract." 784 F.2d at 1537. Title IV-D is also enforced with the threat of loss of federal funds.

Under 42 USC § 603(H) the Secretary of HHS is authorized to reduce the amounts otherwise payable to a state by amounts ranging between one and five percent, depending on the number of times a finding of non-compliance has been made.

The fact that the penalty provision does not allow for a complete cut-off of federal funds does not dilute the federal defendant's enforcement role; rather, it strengthens it. As Judge Tuttle pointed out in his dissent from the majority holding in Brown, complete termination of federal funds is such a drastic remedy that it is rarely imposed. Brown, 784 F.2d at 1542. To Judge Tuttle, the availability of a little-used enforcement mechanism did not indicate that Congress had foreclosed private enforcement. By contrast, the enforcement mechanism behind Title IV-D satisfies both the majority and the dissenting opinions in Brown. Financial

penalties are available, but in a form that encourages their use. In fact, Congress recognized the same problems Judge Tuttle identified. In its report on the 1984 Amendments, which included the present penalty provisions, the Senate Finance Committee called the previous penalty -- a flat loss of five percent of AFDC funds -- a "barrier to the full implementation of existing law." S.Rep. No. 387, 98th Cong., 33, reprinted in 1984 U.S. Code Cong. & Admin. News 2397, 2429. The Committee noted that the harshness of the penalty had resulted in its repeated suspension by legislation to avoid penalizing states "which actually had effective programs or which had made strong efforts to remedy the non-compliance." Id. That the purpose of the more flexible penalty structure was to encourage enforcement is made clear by the Finance Committee's closing comments:

> With these changes, the Committee believes that the audit and penalty provisions of the law should become a powerful tool for Federal oversight aimed at increasing the level of effectiveness to the child support enforcement program.

Id.

Third, as in Brown, an individual grievance procedure is available, and has been utilized by plaintiff Wehunt, who has exhausted the administrative review process of the Georgia Department of Human Resources and has appealed the Franklin County Department of Family and Children Services' determination on benefits to the HHS hearing officer and hearing officer for final appeals. Complaint, para. 37. In addition to the administrative procedures, AFDC recipients can bring an action directly against the responsible parent and join the Georgia Department of Human Resources as a party plaintiff. Department of Human Resources vs. Bagley, 240 Ga. 306,

307-308 (1977). If the DHR fails actively to participate in the action, it may lose its claim for reimbursement of AFDC previously paid. Id. Even where the DHR does actively participate in the action, if it is determined that the Department breached its duty to initiate action the recipient's attorney's fees and costs will be deducted from the DHR's reimbursement. Id.

In short, because of the clear parallels to the Eleventh Circuit's decision in Brown, the court must concluded that private enforcement of Title IV-D has been foreclosed because Congress has designated HHS as the enforcer of the Child Support Enforcement Program. Accordingly, there is no need to reach the second question -- whether Title IV-D creates "rights" enforceable within the meaning of section 1983. See Sea Clammers, 453 U.S. at 19.

B. Whether the Plaintiffs Have A Cause of Action against the Federal Defendant under Title IV-D.

The plaintiffs argue that Title IV-D should be interpreted to create an implied right of action against the federal defendant. In addressing "the recurring question whether Congress intended to created a private right of action under a federal statute without saying so explicitly," the Supreme Court has taken the following approach:

> The key to the inquiry is the intent of the Legislature. We look first, of course, to the statutory language, particularly to the provisions made therein for enforcement and relief. Then we review the legislative history and other traditional aids of statutory interpretation to determine congressional intent.

Sea Clammers, 453 U.S. at 13; see also Merrill Lynch, Pierce, Fenner & Smith vs. Curran, 456 U.S. 353, 378 (1982). As a means of ascertaining such intent, the Eleventh Circuit analyzes four factors

identified as relevant in earlier Supreme Court decisions. See Brown, 784 F.2d at 1538. The four factors are:

> First, is the plaintiff "one of the class for whose especial benefit the statute was enacted," -- that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Cort vs. Ash, 422 U.S. 66, 78 (1975) (original emphasis) (citations omitted).

Applying the four Cort factors, the court concludes, first, that the plaintiffs are among the intended beneficiaries of Title IV-D. This is not to say that the plaintiffs are the only beneficiaries or even the primary beneficiaries. Instead,

in light of the practical results of the Title IV-D program, it seems fair to conclude that the statute has two beneficiaries -- states as direct beneficiaries and AFDC recipients as indirect beneficiaries. Cf. Perry vs. Housing Authority of City of Charleston, 664 F.2d 1210, 1213 (4th Cir. 1981). As the Eleventh Circuit noted in Brown, 784 F.2d at 1538, being among the intended beneficiaries of the statute is sufficient to satisfy the first Cort factor.

Second, both the language and the legislative history of Title IV-D are silent as to congressional intent either to create or to deny a private right of action. That silence does not create a presumption in favor of an implied right of action. Id. at 1539.

As the plaintiffs correctly pointed out, "the state of the law at the time the legislation was enacted" may be an

important indicator of congressional intent on remedies, and any "evaluation of congressional action ... must take into account its contemporary legal context." Merrill Lynch, Pierce, Fenner & Smith vs. Curran, 456 U.S. at 379, quoting Cannon vs. University of Chicago, 441 U.S. 677, 698-699 (1979). The "contemporary legal context" of the legislation at issue here, however, provides no support for the argument that Congress must have intended the courts to imply a private right of action under Title IV-D. The present case is unlike the situation in Curran, where "the federal courts routinely and consistently had recognized an implied private cause of action" under the Commodity Exchange Act. 456 U.S. at 379. Here, prior to the adoption of Title IV-D in 1974, not one federal court had found an implied cause of action against the federal government under any provision of the

Social Security Act. The pre-1974 cases cited by the plaintiffs were brought against state defendants. See, e.g., Goldberg vs. Kelly, 397 U.S. 254 (1970); King vs. Smith, 392 U.S. 309 (1968).

Between 1974 and 1984, when Title IV-D was amended to increase the federal government's role in monitoring the state programs, only two cases were brought against the federal agency under the statute. In Mandley vs. Trainor, 523 F.2d 415 (7th Cir. 1975), a suit challenging Illinois' revised program for emergency assistance to AFDC recipients, jurisdiction against (then) HEW was premised on the mandamus statute, 28 USC § 1361, not on any implied cause of action. Id. at 419 n. 2. In Quarles vs. St. Clair, 711 F.2d 691 (5th Cir. 1983), a suit challenging Mississippi's administration of parts of Titles IV-A and IV-D not at issue here, the basis of jurisdiction against HHS was not

discussed at all. One appellate decision that is, at most, ambiguous on the question of an implied right of action does not create a "contemporary legal context" in which Congress' silence on implied remedies should be taken as approval. Compare Cannon vs. University of Chicago, where Congress incorporated the language of Title VI of the Civil Rights Act of 1964 (which had more than a dozen times been interpreted to allow a private remedy) into Title IX of the Education Amendments of 1972 and "explicitly assumed that it would be interpreted and applied as Title VI had been," 441 U.S. at 696; and Merrill Lynch, Pierce, Fenner & Smith vs. Curran, where congressional amendments to the Commodity Exchange Act left intact the statutory provisions under which "the federal courts routinely and consistently had recognized an implied private cause of action." 456 U.S. at 379.

The third and fourth Cort factors are often treated together, on the rationale that it would "plainly be inconsistent with any legislative scheme in the federal legislation to imply a private cause of action where the legal right invoked is one traditionally left to state law." Brown, 784 F.2d at 1539 quoting Perry, 664 F.2d at 1216. Again on the basis of the Eleventh Circuit's in Brown, the court must conclude that an implied right of action under Title IV-D would be inconsistent with the underlying purposes of the legislative scheme because it would create a cause of action traditionally relegated to state law. In Brown, the court described the plaintiff's challenge to HUD's monitoring as "essentially a rent dispute failing within the area of landlord-tenant relations." 784 F.2d at 1539. The challenge to HHS' monitoring here must necessarily be seen as essentially a

custody dispute falling within the area of family law. The plaintiffs argue that the issue underlying their implied cause of action is not one of family law but of federal law -- i.e., whether the federal defendant has performed the duties established for him by Congress. However, the same argument applies to the issue involved in Brown, where the plaintiffs sought to sue the federal defendant for failure to obtain compliance. The suit here is for the same type of failure. If the issue was not one of federal law in Brown, it is not one of federal law here.

Even if the third factor were to be considered separately, the conclusion would be the same: It would be inconsistent with the underlying purposes of the federal legislative scheme to imply a private remedy for the plaintiffs. If private parties, in individual or class actions, were allowed to challenge the Secretary's

overall administration of the Title IV-D program in a particular state, the courts would be placed in a supervisory position over the Secretary and would be called on to make decisions -- such as what the statute requires in terms of specific reporting and program requirements -- that Congress deliberately delegated to the Secretary. Private suits challenging particular decisions by the Secretary would require the courts to balance a number of opposing interests; i.e., federal agency resources and state resources versus a plaintiff's interest in the $50 disregard and the psychological benefits of paternity determinations, all in the contest of the facts of a particular case. The necessity for similar balancing in the utility allowance context led the Eleventh Circuit in Brown and the Fourth Circuit in Phelps and Wright to conclude that it was "highly unlikely that Congress intended federal

courts 'to make the necessary balancing.'" 784 F.2d at 1537.

The court analysis, in light of Brown, yields the conclusion that Title IV-D does not create an implied private right of action against the federal defendant.

IV. MOTION FOR LEAVE TO AMEND.

Also pending before the court is the plaintiffs' motion for leave to amend their complaint against the federal defendant to clarify that they seek mandamus relief under 28 USC § 1361 and to add a claim for relief under the Administrative Procedure Act, 5 USC §701, et seq. Because the federal defendant has already answered the previous complaint, the plaintiffs may amend only by leave of court, which "shall be freely given when justice so requires." Rule 15(a), Fed. R. Civ. P.

The defendant opposes the motion, arguing that leave to amend should be

denied for repeated failure to cure deficiencies in previous complaints, lack of diligence, and prejudice to the opposing party. However, the cases cited by the defendant in support of his arguments are all quite different from the present case. In Freeman vs. Continental Gin Company, 381 F.2d 459 (5th Cir. 1967), the defendant's motion to amend its counterclaim came eight months after summary judgment had been granted for the plaintiff and "might well have been refused on the ground that it would be futile." Id. at 468. In Murphy vs. White Hen Pantry Company, 691 F.2d 350 (7th Cir. 1982), the plaintiff sought to amend his complaint two years after the action was filed, six weeks before trial, and several months after discovery had been completed, leading the court to conclude that the defendant would have been prejudiced by the amendment. In Union Planters National Leasing, Inc. vs.

Woods, 687 F.2d 117 (5th Cir. 1982), the amendment was sought after discovery had been completed and after a motion for summary judgment had been granted.

In contrast to the above-cited cases, there is little reason not to grant leave to amend in this case. The case is not near trial. The new theory of recovery being advanced differs from the previous theories primarily jurisdictionally; the underlying facts are basically the same as for the previously-asserted theories so that the plaintiff cannot claim lack of notice. Discovery has not yet been completed; the court earlier stated its intention to allow an additional four months for discovery if the pending motions to dismiss were denied and an additional six months for discovery if a class was certified. The plaintiffs contend that any additional discovery necessitated by the amendment will not be substantially

different from the type of discovery already contemplated, and the plaintiffs have not shown otherwise. Finally, Eleventh Circuit precedent makes it clear that dismissal of the plaintiffs' previous complaints "does not automatically terminate the action unless the court holds either that no amendment is possible or that the dismissal of the complaint also constitutes a dismissal of the action." Czerencha vs. International Association of Machinists and Aerospace Workers, 724 F.2d 1552, 1554 (11th Cir. 1984). The dismissal order in this case is contemporaneous with leave to amend.

The court finds that little or no prejudice to the defendants will result from this amendment, and the plaintiffs' motion for leave to amend is therefore GRANTED.

V. MOTION FOR CLASS CERTIFICATION.

In view of the foregoing dismissals of the plaintiffs' previous complaints, the plaintiffs' motion for class certification is DENIED as moot. The motion may be renewed under the amended complaint yet to be filed if the plaintiffs so choose.

VI. CONCLUSION.

The plaintiffs do not have a cause of action against the state defendant under 42 USC §1983 because Congress foreclosed private enforcement of Title IV-D. The plaintiffs do not have a cause of action against the federal defendant under Title IV-D for the same reason: Congress simply did not intend that Title IV-D should be enforced by private action. The defendants' separate motions to dismiss for failure to state a claim pursuant to Fed. R.Civ. P. 12(b)(6) are therefore GRANTED.

Because little or no prejudice to the defendants will result, the plaintiffs' motion for leave to amend their complaint is GRANTED. The plaintiffs shall have ten (10) days from receipt of this order in which to file their third amended complaint containing their mandamus and APA claims against the federal defendant. The defendant shall have fifteen (15) days to answer. Any further Rule 12 motions shall be filed no later than thirty (30) days after the defendant answers or should answer the amended complaint. The plaintiffs' response to any such motions will be due no later than thirty (30) days thereafter.

The plaintiffs' motion for class certification is DENIED as moot. The court's previously-issued stay of discovery remains in effect pending the resolution of any Rule 12 motion.

Finally, the parties are reminded that this court's Case Instructions limit briefs to twenty-five (25) pages, double-spaced, unless leave to exceed is obtained in advance. Any brief in excess of fifteen (15) pages shall be indexed. Non-complying briefs will not be considered.

SO ORDERED, this 30th day of September, 1986.

/S/
J. OWEN FORRESTER
UNITED STATES DISTRICT JUDGE

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOY D. HUNT, et al.	)	
	)	C85-2891A
v.	)	
	)	J. OWEN FORRESTER
JAMES G. LEDBETTER, et al.	)	
	)	

[X] **Decision by Court.** This action came for consideration and hearing before the Court with the judge named above presiding. The issues have been tried or heard and a decision has been rendered, granting defendants' motion to dismiss.

IT IS ORDERED AND ADJUDGED

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that the plaintiffs take nothing, that the action be dismissed, and that the defendants, JAMES G. LEDBETTER, in his official capacity as Commissioner of the Georgia Department of Human Resources, and

OTIS OWEN, recover from the plaintiff, JOY D. WEHUNT, and plaintiff/intervenors, BRENDA WHITE AND GWENDOLYN BROWN, their costs of action.

FILED AND ENTERED IN CLERK'S OFFICE
March 11, 1987
Luther D. Thomas, Clerk

BY: /S/
Janice C. Murray, Deputy Clerk

CLERK: Luther D. Thomas

DATE: March 11, 1987

CLERK

Luther D. Thomas

BY DEPUTY CLERK:

DATE

March 11, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOY D. WEHUNT LEWALLEN, et al.,	)	
Plaintiffs,	)	CIVIL ACTION NO. C85-2891A
vs.	)	
JAMES G. LEDBETTER, et al.,	)	
Defendants.	)	

ORDER

This action is before the court on the federal defendant's motion to dismiss the plaintiffs' third amended complaint for failure to state a claim upon which relief can be granted, the plaintiffs' motion to vacate and set aside the court's previous order of dismissal as to the state defendant, the plaintiffs' motion for class certification, and the plaintiffs' motion for Rule 54(b) certification. The background and procedural history of the

case are by now familiar to all involved and require only brief recounting here. The plaintiffs filed this action against the Commissioner of the Georgia Department of Human Resources (the state defendant) and the Secretary of the United States Department of Health and Human Services (the federal defendant) seeking declaratory and injunctive relief for violations of their civil rights under Title IV-A and Title IV-D of the Social Security Act, 42 USC §§ 601, et seq. and § 651, et seq. All of the plaintiffs' Title IV-D claims were dismissed by this court's order filed October 1, 1986, which held that the plaintiffs did not have a cause of action against the state defendant under 42 USC § 1983 because Congress foreclosed private enforcement or Title IV-D and that the plaintiffs did not have a cause of action against the federal defendant because Congress did not intend that Title IV-D

should be enforced by private action. The plaintiffs' Title IV-A claims were later resolved under a consent order entered January 20, 1987. At the same time that it dismissed the plaintiffs' Title IV-D claims, the court permitted the plaintiffs to file a third amended complaint stating claims under the mandamus statute and the Administrative Procedure Act. As a result, only the mandamus and APA claims remain in the case, and those claims are the object of the federal defendant's present motion to dismiss.

In simplified form, the plaintiffs contend that the federal defendant has failed to do three things. First, the defendant "has failed to promulgate adequate regulations, concerning, inter alia, (a) minimum performance standards regarding the location of absent parents, establishment of paternity, and collection of child support to assure that such

programs are effective, and (b) minimum organizational and staffing requirements for state child support recovery programs." Complaint, para. 50. Second, the defendant has failed to monitor adequately the state program. Complaint, para. 51. Third, the defendant has failed to sanction the state for non-compliance with the requirements of Title IV-D. According to the plaintiffs, due to the federal defendant's failures, the State of Georgia operates an inadequate and ineffective program for the establishment of paternity or enforcement of child support. Due to the inadequacies of the state program, the plaintiffs have lost their opportunity to receive regular child support payments and have lost their opportunity to receive, while participating in the AFDC program, the first $50 in monthly support paid by the absent parents of their children. Complaint, para. 60. The plaintiffs therefore seek mandamus and

injunctive relief requiring the federal defendant to rectify his failures, which will in turn result in the state's operation or a program that complies with Title IV-D.

I. MOTION TO DISMISS.

The defendant's primary argument in support of his motion to dismiss the complaint is that the plaintiffs have no standing to assert their Administrative Procedure Act and mandamus claims. To satisfy the minimum requirements of Article III's "case or controversy" provision, the plaintiffs must "establish that, in fact, the asserted injury was the consequence of the defendant's actions, or that prospective relief will remove the harm." Warth v. Seldin, 422 U.S. 490, 505 (1975). As the Court of Appeals for the D.C. Circuit has said:

> At its "irreducible minimum," the Article III standing requirement

> demands that a plaintiff properly allege (1) an "injury in fact" to his own interest that (2) is "fairly traceable" to the defendant's conduct, and that (3) is sufficiently likely to be redressed in a tangible way by available judicial relief.

Common Cause v. Department of Energy, 702 F.2d 245, 250 (D.C. Cir. 1983) (footnotes omitted).[1]

The court agrees with the defendant that the plaintiffs' complaint fails to set out facts sufficient to establish either causation or redressability. Comparison with other cases exploring the same issue

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[1] Claimants under the Administrative Procedure Act must go further and establish that "the alleged injury was to an interest 'arguably within the zone of interest to be protected or regulated' by the statutes that the agencies were claimed to have violated." Sierra Club v. Morton, 405 U.S. 727, 733 (1972). As in Common Cause, 702 F.2d at 250 n. 35, however, that additional non-constitutional "prudential" requirement need not be considered in light of the court's conclusion with regard to the constitutional requirements.

demonstrates the plaintiffs' lack of standing in the present case. In Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1975), the complaint alleged that an IRS policy on tax treatment "encouraged" hospitals not to treat indigents and that the plaintiffs had been injured by certain hospitals' denial of treatment due to their indigency. The plaintiffs sought to have the offending policy invalidated and replaced with a policy discouraging the denial of services to indigents. The Supreme Court held that the complaint should have been dismissed because the plaintiffs lacked standing. The Court described as "purely speculative" the plaintiffs' argument that the denial of hospital treatment in fact resulted from the IRS policy or that a court ordered change in the policy would result in the plaintiffs'

In Warth v. Seldin, 422 U.S. 490, the complaint alleged that a town's zoning ordinance limiting housing developments to single family homes operated to exclude persons of low and moderate income because the houses built pursuant to the ordinance were not within the plaintiffs' price range. The plaintiffs therefore sought an injunction requiring a new ordinance. The court held that, in order to satisfy standing requirements, the plaintiffs were required to "allege facts from which it reasonably could be inferred that, absent the [defendants'] restrictive zoning practices, there is a substantial probability that they would have been able to purchase or lease in [the town] and that, if the court affords the relief requested, the asserted inability of [the plaintiffs] will be removed." Id. at 504. The Court found the complaint "devoid of the necessary allegations," Id., and upheld

the district court's dismissal of the complaint.

In Common Cause v. Department of Energy, 702 F.2d 245 (D.C.Cir. 1983), a group of energy consumers sought to require the Department of Energy to develop statutorily mandated energy conservation plans for federal buildings. The court of appeals affirmed the district court's judgment dismissing the complaint because the plaintiff's assumption that judicial relief would reduce government energy consumption was "conjectural at best, and therefore cannot support standing." Id. at 252.

Finally, in Starbuck v. City and County of San Francisco, 556 F2d 450 (9th Cir. 1977) a group of electricity consumers sought an injunction ordering the Federal Secretary of the Interior to sue the city to change its agreement with a utility company. The court held that the

plaintiffs had failed to "show that the remedy they seek would cure the injury of which they complain," id., at 458, because they had made no showing that their rates would decrease if they were successful in their action. In addition, the plaintiffs failed to show the essential causal link between their injury and the Secretary of Interior's alleged inaction. Id. The court therefore affirmed the district court's dismissal of the complaint for failure to state a claim.

The courts' emphasis on redressability is not casual but is rooted in serious constitutional concerns. As the Court of Appeals for the D.C. Circuit stated:

> The "vitality" of the redressability requirement has been "repeatedly reaffirmed." The requirement serves to limit the judicial role to measures that will produce tangible, meaningful results in the real world. By preventing courts from "rummaging aimlessly through the policy decisions of the elected branches in search of defective government action," it acts as an important

> check upon the power of the judiciary in our scheme of coordinate government branches.

Common Cause, 702 F.2d at 254 (footnotes omitted).

The plaintiffs' claim here is based on a four-step "trickle down" theory or causation and redress: The federal defendant's lack of action permitted the state's lack of action, which permitted the absent parents' lack of action, which injures the plaintiffs to the extent of their $50 monthly pass-through. Conversely, an order from this court requiring the federal defendant to perform fully his alleged statutory duties will cause the state to implement an effective Title IV-D program, which will ensure the absent parents' performance of their legal duties, which will redress the plaintiffs' injuries. It is clear from the above discussion of previously decided cases that the plaintiffs' theory is untenable; as did

the plaintiffs in Warth v. Seldin, the plaintiffs here "rely on little more than the remote possibility, unsubstantiated by allegations of fact, that their situation might have been better had [the defendant], acted otherwise, and might improve were the court to afford relief." 422 U.S. at 507. As the Court concluded in Warth:

> [A] plaintiff ... must allege specific, concrete facts demonstrating that the challenged practices harm him, and that he personally would benefit in a tangible way from the Court's intervention. Absent the necessary allegations of demonstrable, particularized injury, there can be no confidence of "a real need to exercise the power of judicial review" or that relief can be framed "no broader than required by the precise facts to which the court's ruling would be applied."

Id. at 508 (footnote and citation omitted). Accordingly, the plaintiffs lack standing to assert these claims against the federal defendant; the defendant's motion to dismiss the complaint for failure to state a claim is therefore GRANTED.

II. REMAINING MOTIONS.

Given the court's disposition of the defendant's motion to dismiss the only remaining claims in the case, the plaintiffs' motions for class certification and for Rule 54(b) certified are DENIED as moot.

The plaintiffs also move this court to vacate and set aside its previous order dismissing the claims against the state defendant and the federal defendant. In that order, the court relied heavily on the Eleventh Circuit's panel decision in Brown v. Housing Authority of the City of McRae, Georgia, 784 F.2d 1533 (11th Cir. 1986). The panel decision has since been vacated temporarily while the Eleventh Circuit rehears the case en banc. In addition, the Supreme Court recently reversed the Fourth Circuit's decision in Wright v. City of Roanoke Redevelopment and Housing Authority, 771 F.2d 833 (4th Cir.

1985), on which the Eleventh Circuit panel relied in Brown. See 107 S.Ct. 766 (1987). However, the court is not convinced that the recent decisions or the Eleventh Circuit and the Supreme Court compel a different result than that reached in its earlier order. While it appears that the Supreme Court's decision in Wright may compel a different result in Brown with regard to the Eleventh Circuit panel's analysis of the section 1983 claim, Wright does not necessarily require a different result for the section 1983 claim against the state defendant in this case. Wright and Brown are virtually indistinguishable because they involve the same statute, the Housing Act of 1937, 42 USC § 1437(a). This action, of course, involves a completely different statute. Moreover, the court already has identified features of the Title IV-D program that support its dismissal or the §1983 claim even more

strongly than in Brown. See Order, October 1, 1986 at 10-12.

The plaintiffs also fail to note that the Supreme Court's decision in Wright, 107 S.Ct. 766, did not address at all the implied right of action issue raised by the plaintiff's claims against the federal defendant under Title IV-D. There is therefore no reason to assume that the Eleventh Circuit's result will be any different in Brown on that issue. It would make no sense to proceed with discovery in this case on some or all of the plaintiffs' previously dismissed claims on the speculation that the Eleventh Circuit may change all or some of the result in Brown and that any changes in Brown would require corresponding changes in this court's previous order. Therefore, the plaintiffs' motion to vacate and to set aside this court's previous order is DENIED.

SO ORDERED, this 9th day of March, 1987.

/S/
J. OWEN FORRESTER
UNITED STATES DISTRICT JUDGE

STATUTORY MATERIALS

42 U. S. C. § 602(a)(26)

(a) A state plan for aid and services to needy families with children must ...

(26) provide that, as a condition of eligibility for aid, each applicant or recipient will be required --

> (A) to assign the State any rights to support from any other person such applicant may have (i) in his own behalf or in behalf of any other family member for whom the applicant is applying for or receiving aid, and (ii) which have accrued at the time such assignment is executed;
>
> (B) to cooperate with the State (i) in establishing the paternity of a child born out of wedlock with respect to whom aid is claimed, and (ii) in obtaining support payments for such applicant and for a child with respect to whom such aid is claimed, or in obtaining any other payments or property due such applicant or such child, unless (in either case) such applicant or recipient is found to have good cause for refusing to cooperate as determined by the State agency in accordance with standards prescribed by the Secretary, which standards shall take into consideration the best interests of the child on whose behalf aid is claimed; and that, if the relative with whom a child is living is found to be ineligible because of failure to comply with the requirements of subparagraphs (A) and (B) of this

paragraph, any aid for which such child is eligible will be provided in the form of protective payments as described in section 606(b)(2) of this title (without regard to clauses (A) through (D) of such section); unless the State agency, after making reasonable efforts, is unable to locate an appropriate individual to whom such payments can be made; and

(C) to cooperate with the State in identifying, and providing information to assist the State in pursuing, any third party who may be liable to pay for care and services available under the State's plan for medical assistance under subchapter XIX of this chapter, unless such individual has good cause for refusing to cooperate as determined by the State agency in accordance with standards prescribed by the Secretary, which standards shall take into consideration the best interests of the individuals involved; but the State shall not be subject to any financial penalty in the administration or enforcement of this subparagraph as a result of any monitoring, quality control, or auditing requirements;

42 U. S. C. § 602(a)(8)(A)(vi)

(a) A State plan for aid and services to needy families with children must ...

(8)(A) provide that, with respect to any month, in making the determination under paragraph (7), the State agency --

(vi) shall disregard the first $50 of any

child support payments for such month received in that month, and first $50 of child support payments for each prior month received in that month if such payments were made by the absent parent in the month when due, with respect to the dependent child or children in any family applying for or receiving aid to families with dependent children (including support payments collected and paid to the family under section 657(b) of this title);....

42 U. S. C. § 602(a)(28)

(a) A State plan for aid and services to needy families with children must ...

(28) provide that, in determining the amount of aid to which an eligible family is entitled, any portion of the amounts collected in any particular month as child support pursuant to a plan approved under part D of this subchapter, and approved under this part as in effect both during July 1975 and during that particular month) would not have caused a reduction in the amount of aid paid to the family if such amounts had been paid directly to the family, shall be added to the amount of aid otherwise payable to such family under the State plan approved under this part;....

42 U. S. C. § 651

For the purpose of enforcing the support obligations owed by absent parents to their children and the spouse (or former spouse) with whom such children are living, locating absent parents, establishing paternity, obtaining child and spousal support, and assuring that assistance in obtaining support will be

available under this part to all children (whether or not eligible for aid under part A) for whom such assistance is requested, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part.

42 U. S. C. § 657(b)(1)

(b) The amounts collected as support by a State pursuant to a plan approved under this part during any fiscal year beginning after September 30, 1976, shall (subject to subsection (d)) be distributed as follows:

> (1) of such amounts as are collected periodically which represent monthly support payments, the first $50 of any payments for a month received in that month, and the first $50 of payments for each prior month received in that month which were made by the absent parent in the month when due, shall be paid to the family without affecting its eligibility for assistance or decreasing any amount otherwise payable as assistance to such family during such month;....

42 U. S. C. § 657(c)

Whenever a family with respect to which child support enforcement services have been provided pursuant to section 654(4) of this title ceases to receive assistance under part A of this subchapter, the State shall provide appropriate notice to the family and continue to provide such services, and pay any amount of support collected, subject to the same conditions and on the same basis as in the case of the individuals to whom services are furnished

pursuant to section 654(6) of this title, except that no application or other request to continue services shall be required of a family to which this subsection applies, and the provisions of section 654(6)(B) of this title may not be applied.

No. 89-1030

Supreme Court, U.S.
FILED
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CLERK

In The

Supreme Court of the United States

October Term, 1989

GWENDOLYN BROWN,

Petitioner,

v.

JAMES G. LEDBETTER,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MICHAEL J. BOWERS
Attorney General

H. PERRY MICHAEL
Executive Assistant Attorney General

STEPHANIE B. MANIS
Deputy Attorney General

WILLIAM C. JOY
Senior Assistant Attorney General

MARY FOIL RUSSELL
Assistant Attorney General
Counsel of Record for Respondent

132 State Judicial Building
Atlanta, Georgia 30334
(404) 656-3334

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether recipients of public assistance have enforceable rights within the meaning of 42 U.S.C. § 1983 to bring actions in the federal courts for alleged violations of the Child Support Enforcement Act, Title IV-D of the Social Security Act, 42 U.S.C. § 651 *et seq.*

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No. 89-1030

In The

Supreme Court of the United States

October Term, 1989

GWENDOLYN BROWN,

Petitioner,

v.

JAMES G. LEDBETTER,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Respondent James G. Ledbetter respectfully requests that this Court deny the Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit. That opinion is reported as *Wehunt v. Ledbetter,* 875 F.2d 1158 (11th Cir. 1989).

STATEMENT OF THE CASE

This action originated in the District Court for the Northern District of Georgia in an action brought by Joy D. Wehunt. Plaintiff Wehunt sued the Commissioner of

the Georgia Department of Human Resources (hereinafter the Commissioner) and the Secretary of Health and Human Services (hereinafter the Secretary). The suit was brought pursuant to 42 U.S.C. § 1983. Plaintiff Wehunt alleged that Defendants had violated her rights pursuant to the Child Support Enforcement Act, 42 U.S.C. § 651, *et seq.*[1] The issue in this Petition is whether this Act creates enforceable rights to sustain an action under § 1983.

Wehunt's claims under the Child Support Enforcement Act were that the Commissioner had failed to provide her with necessary services to locate the absent father of her child, to establish paternity of the child, and to enforce a support obligation for the child. Plaintiff Wehunt asserted that the Secretary had failed in his duty to oversee Georgia's operation of its state plans under Titles IV-A and IV-D and in his obligation to enforce compliance by the Commissioner with the conditions of participation in the AFDC program. The original complaint of Plaintiff Wehunt is included as Respondent's Appendix A, App. 1-23.

On October 23, 1985, the district court granted the motion of Brenda White and Gwendolyn Brown (hereinafter Petitioner) to intervene as Plaintiffs and to file an amended complaint. Their amended complaint is

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[1] Joy Wehunt (now Joy Lewallen) also brought a claim under Title IV-A of the Social Security Act, the Aid To Families With Dependent Children Act, 42 U.S.C. § 601, *et seq.* This claim was resolved through a consent order and is no longer at issue.

included as Respondent's Appendix B, App. 24-57. Plaintiffs further moved for class certification. On May 27, 1986, Respondent filed a Motion to Dismiss pursuant to Fed. R. Civ. P. 12. The Secretary filed a similar motion on May 23, 1986. On October 1, 1986, the trial court entered an order dismissing the Petitioner's claims against the Commissioner under 42 U.S.C. § 1983. The Court subsequently dismissed all claims against the Secretary and denied as moot Petitioner's Motion for Class Certification.

Petitioner and her co-Plaintiffs below are recipients of public assistance under the Aid To Families With Dependent Children program (AFDC). As a condition of receipt of AFDC, they are required to assign to the State their rights to collect support. 42 U.S.C. § 602(a)(26)(A). The AFDC program is included as part A of Title IV of the Social Security Act. 42 U.S.C. § 601 *et seq*. The Child Support Enforcement Act is part D of Title IV of the Social Security Act. 42 U.S.C. § 651 *et seq*. The states which participate in the AFDC program must also participate in the Title IV-D child support recovery program. 42 U.S.C. § 602(a)(27). Although the Social Security Act previously contained some provisions regarding collections of child support as part of the AFDC program,[2] the Child

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[2] Prior to 1975, the AFDC state plan requirements provided that states, effective July 1, 1952, must provide notice to law enforcement officials of children who had been deserted or abandoned. Social Security Amendments of 1950, Pub. L. No. 734, § 321(b), 64 Stat. 477, 549-50 (1950). States were required to provide for entering into cooperative arrangements with

(Continued on following page)

Support Enforcement Act was created as a part of the Social Services Amendment of 1974. Social Security Amendments of 1974, Pub. L. No. 93-647, Part B, § 101, 88 Stat. 2337, 2351 (1974).

The Child Support Enforcement Act requires any state participating in the AFDC program to create a distinct governmental unit to recover child support. Prior to 1975 monthly "countable income" for AFDC eligibility included child support payments. Since 1975, each AFDC recipient is required to assign to the State any rights to support which any person in the AFDC grant group may have. 42 U.S.C. § 602(a)(26)(A). This assignment is an express condition of receiving AFDC. *Id.* Support which is collected by the state agency must be distributed according to the distribution scheme in 42 U.S.C. § 657(b). Under this scheme, the first fifty dollars of support collected goes to the family. 42 U.S.C. § 657(b)(1).[3] The

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(Continued from previous page)

appropriate courts and law enforcement officials to assist in establishing paternity and collecting child support. Social Security Amendments of 1967, Pub. L. No. 90-248, § 201(a)(1)(C), 81 Stat. 821, 879 (1967) (amending 42 U.S.C. § 602(a)).

[3] Until 1984, the collections primarily went to the state and federal governments to reimburse the government for the payments which had been made to the family. However, pursuant to § 2640(b)(1) of the Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494, codified at 42 U.S.C. § 657(b)(1), effective October, 1984, the first fifty dollars of the amounts collected in each month for an AFDC family are paid to the family without affecting its eligibility for benefits.

remainder of the monthly support payments goes to the state and federal government to reimburse the public treasury for assistance payments made to the family. This statutory scheme is designed to recoup monies paid by taxpayers on behalf of children from the absent parents who should be supporting their children.

The legislative history of the Child Support Enforcement Act reveals that Congress was concerned with children who were receiving AFDC because they had been deprived of the support of a parent. "The problem of welfare in the United State is, to a considerable extent, a problem of the non-support of children by their absent parents." S. Rep. No. 93-1356, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 8133, 8145. Therefore, the Child Support Enforcement Act was primarily designed to encourage states to locate absent parents and to obtain support payments in order to have children supported by their parents rather than through public assistance. *Id.* at 8146.

The Secretary of the Department of Health and Human Services establishes standards for the child support program and reviews and approves state plans which must be accepted in order for the state to receive federal money. 42 U.S.C. § 652(a)(1)(2)(3). The Act details the requirements which the state plan must contain. 42 U.S.C. § 654. The Act requires that the state "undertake" to establish paternity of children who receive AFDC and "undertake" to secure support for children receiving AFDC from their responsible parents. 42 U.S.C. § 654(4)(A)(B). The state receives a specified percentage of the administrative cost of the program pursuant to 42 U.S.C. § 655. In addition to the appropriations made to

the state under § 655, 42 U.S.C. § 658 provides for incentive payments made to the states for collections made in a cost effective and efficient manner.

As Petitioners note, Georgia is a "fill-the-gap" state. Petition at 7. This means that an AFDC family may receive a supplemental AFDC payment to fill the gap between the states "payments standard" and its "standard of need". This supplemental payment is made pursuant to 42 U.S.C. § 602(a)(28). In contrast to Petitioners' statement, this is not a receipt of child support collections but is a supplemental payment made from Title IV-A funds.

The original Plaintiff Joy D. Wehunt alleged that the Commissioner had failed to provide her with adequate and timely child support recovery and paternity establishment services. The State has since been successful in receiving child support on her behalf and she is no longer a party to this action. Petitioner Brenda White is also no longer a party to the action. Petitioner Gwendolyn Brown has three minor children and receives benefits under the Aid To Families With Dependent Children (AFDC) program. As to one of those children, Kateia Nicole Pinkston, Ms. Brown originally alleged that there had been no paternity determination as to this child. The Commissioner has been successful in obtaining an order of paternity concerning Kateia Pinkston and since May, 1989, her father has been paying child support on her behalf. Appellants' other two children were born during her marriage to Jerry Blane Brown. Under a divorce decree, Petitioner's former husband was ordered to pay child support for these two children. Mr. Brown has made payments towards the support of these children pursuant

to a wage assignment. Therefore, subsequent to the events described by Petitioner, Petition at 10, Petitioner Brown has received services from the Respondent.

REASONS FOR DENYING THE WRIT

I. THE ELEVENTH CIRCUIT COURT OF APPEALS CORRECTLY APPLIED THE LAW IN FINDING NO SUFFICIENTLY SPECIFIC AND DEFINITE RIGHTS TO BE ENFORCEABLE UNDER § 1983.

A. THE COURT OF APPEALS PROPERLY APPLIED THE CASE LAW CONCERNING ENFORCEABLE RIGHTS UNDER 42 U.S.C. § 1983.

Petitioner alleges that she has rights under the Child Support Enforcement Act, 42 U.S.C. § 651 *et seq.* which are enforceable under 42 U.S.C. § 1983. Section 1983 provides redress for the deprivation of "any rights, privileges, or immunities secured by the Constitution and laws" of the United States. In *Maine v. Thiboutot*, 448 U.S. 1 (1980), this Court made clear that an action under § 1983 may be based solely upon violation of a federal statute. *Id.* at 4-5. Although a § 1983 claim may be based on a federal statute, this Court has recognized two limitations to the application of § 1983 to remedy statutory violations. *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), and *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981). The *Sea Clammers* limitation applies where Congress in enacting the statute in question has foreclosed private enforcement for violations of the statute through

its comprehensive remedial scheme. The *Pennhurst* limitation applies where the statutory provisions involved encourage state services but do not create enforceable rights. The focus under this exception is whether rights are sufficiently "specific and definite to qualify as enforceable rights under *Pennhurst* and § 1983". *Wright v. City of Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 432 (1987).

The opinion of the Eleventh Circuit in the current case correctly outlines the law pertaining to enforceable rights under 42 U.S.C. § 1983. App. 24-A – 26-A. Contrary to Petitioner's argument, the Eleventh Circuit did not unduly rely upon *Cort v. Ash*, 422 U.S. 66 (1975). Petitioners correctly note that in *Cort v. Ash* this Court established a four-prong test for determining when a cause of action can be implied from a federal statute. The first factor of the *Cort* test examines whether the Plaintiff is "'one of the class for whose especial benefit the statute was enacted,' . . . that is, does the statute create a federal right in favor of the Plaintiff?" *Id.* at 78. The Eleventh Circuit properly used this prong of the *Cort* test as a tool in determining whether the federal statute creates rights enforceable under § 1983. App. 28-A – 30-A. The opinion quoted from *Edwards v. District of Columbia*, 821 F.2d 651 (D.C. Cir. 1987) in which that court utilized *Cort's* first factor to analyze the question of whether a public housing statute created rights enforceable under § 1983. As did the court in *Edwards*, the circuit court in the current case has simply utilized the established case law in implied cause of action cases to aid in examining the related question of whether § 1983 creates enforceable rights. Other circuits have similarly utilized the first *Cort*

factor in examining § 1983 questions. *Id.; Clallam County v. Department of Transportation of the State of Washington,* 849 F.2d 424 (9th Cir. 1988), *cert. denied* 190 S.Ct. 790 (1989).[4] Accordingly, the Eleventh Circuit did not improperly rely on *Cort v. Ash* but rather used the first *Cort* factor as a guideline in examining whether enforceable rights exist under § 1983 in these circumstances.

Petitioners would have it appear that the first *Cort* factor (whether Plaintiff is of the class for who especial benefit the statute was enacted) is diametrically opposed to the *Pennhurst* exception to a § 1983 cause of action, where Congress has not created enforceable rights. Rather than being two very separate doctrines, the two inquiries are actually quite similar. This similarity is noted in the dissenting opinion in *Wright v. City of Roanoke Redevelopment and Housing Authority,* 479 U.S. 418 (1987). "Whether a federal statute confers substantive rights is not an issue unique to § 1983 actions. In implied right of action cases, the Court also has asked, since *Cort v. Ash,* 422 U.S. 66, 78 (1975), whether 'the statute create[s] a federal right in favor of the Plaintiff.' " *Id.* at 432-433; *see also Clallam County,* 849 F.2d at 428. Whether the question is phrased in *Cort v. Ash* terms of "especial benefit" or in *Wright v. City of Roanoke* terms of "specific and definite" benefits, the issue is basically the same.

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[4] The Ninth Circuit in *Clallam* stated: "the second exception – whether the statute was the kind that did not create enforceable rights – seems tautological. Our court, however, has interpreted the requirement as similar to the 'especially benefited class' prong of *Cort v. Ash* . . . ." *Id.* at 428.

That is, the court must consider whether the Plaintiffs under the facts alleged have sufficient rights found in either the Constitution or laws to create rights enforceable under § 1983. This most basic inquiry is required by the language of § 1983 itself which redresses deprivation of rights "secured" by the laws of the United States. In the current case, the Eleventh Circuit correctly found no such enforceable rights secured by the statute at issue.

B. THE ELEVENTH CIRCUIT REACHED THE CORRECT RESULT IN FINDING THAT PETITIONER HAS NO ENFORCEABLE RIGHTS UNDER § 1983.

As argued above, the Eleventh Circuit properly understood and applied the law in this area. Assuming *arguendo* that the court should not have been guided by *Cort v. Ash*, the result, using *Pennhurst* and *Wright* exclusively, is the same. In *Pennhurst State School v. Halderman*, 451 U.S. 1 (1981), this Court considered whether Congress intended through the Developmentally Disabled Assistance and Bill of Rights Act of 1975 (42 U.S.C. § 6000 *et seq.*) to create enforceable rights which could be enforced through § 1983. That Act created a federal-state grant program whereby the federal government provides financial assistance to states to aid them in creating programs to care for the developmentally disabled. The provisions of the Act expressed a congressional preference for certain types of treatment for disabled individuals. *Id.* at 19. However, this Court found that Congress intended to

encourage, rather than mandate, better services to the disabled. *Id.* at 20.[5]

The child support recovery program is primarily designed to require able absent parents to provide for their children rather than having the family rely on public assistance. The legislative history surrounding the 1974 enactment of the Child Support Enforcement Act demonstrates that Congress was primarily concerned with collecting support in order to reduce the welfare roles. *See, e.g.*, S. Rep. No. 93-1356, 93rd Cong., 2d Sess., *reprinted* in 1974 U.S. Code Cong. & Admin. News 8133, 8145, 8154, 8158. Except for a brief period at the inception of the program, recipients of AFDC had no financial interest in the collections which the State made until Congress enacted the fifty dollar disregard in October of 1984. The disregard provision, codified at 42 U.S.C. § 657(b)(1), provides that the first fifty dollars of any child support collected goes directly to the family without a reduction in public assistance. The purpose of the disregard is two-fold. First, it encourages the AFDC recipient to assist the State in identifying, locating, and pursuing legal action against the absent father. Additionally, there is some incentive for the absent parent to timely make payments if he knows that a portion of the amount goes directly to support his child. Even with the

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[5] The *Pennhurst* case was remanded to the Third Circuit for consideration of a number of issues. On remand the Third Circuit did not reach the federal issues raised because it determined that Plaintiffs were entitled to relief on purely state law grounds. *Pennhurst*, 673 F.2d 647 (3rd Cir. 1982), *rev'd. Pennhurst State School v. Halderman*, 464 U.S. 89 (1984).

fifty dollar disregard provision, the primary purpose of the program remains the same, that is, to reimburse the federal and state government for their expenditures of public assistance. The largest portion of funds collected go toward that goal.

As in *Pennhurst*, the Child Support Enforcement Act is primarily a funding act. Through both the provision of funding for the child support recovery program and through state plan requirements, Congress intended to legislate by "making declarations of policy and indicating a preference while requiring measures that, though falling short of legislating its goals, serve as a nudge in the preferred direction." *Pennhurst*, 451 U.S. at 19.

The statute in which Petitioner finds her entitlement to the State's child support services is clearly a funding statute. 42 U.S.C. § 651. App. 3-E. The Act further provides financial incentives to the State for compliance and monetary penalties for noncompliance as well as payments for administrative costs in administering the program. 42 U.S.C. §§ 655, 658. In exchange for federal funds, the State must make assurances in its state plan requirement as set out at 42 U.S.C. § 654. 42 U.S.C. § 654(4) provides that the State will "undertake" to establish paternity for a child born out of wedlock and will "undertake" to secure support for that child. Congress clearly recognized that the State will not be successful in collecting child support or establishing paternity in every case; however, it must make assurances that it will undertake to do so. Because the primary thrust of the Child Support Enforcement Act is to recover public assistance monies paid by the state and federal governments, the Petitioner is an incidental beneficiary.

In *Wright v. City of Roanoke Redevelopment and Housing Authority*, 479 U.S. 418 (1987), this Court found that the Brooke amendment to the Housing Act of 1937 which provided a rent ceiling for tenants of low-income housing created enforceable rights within the meaning of 42 U.S.C. § 1983. The Court concluded, based upon that statute, that the benefits Congress intended to confer upon tenants were "sufficiently specific and definite to qualify as enforceable rights under *Pennhurst* and § 1983". *Id.* at 432. In this case no such specific and definite benefits are created in the Child Support Enforcement Act. The benefit to the AFDC recipient is incidental to the major thrust of the statute, which is to recoup state and federal dollars. In sum, the Child Support Enforcement Act does not create enforceable rights within the meaning of *Pennhurst* and *Wright*. The Eleventh Circuit correctly resolved this issue and this Court need not grant certiorari in this case.

II. THE LAW CONCERNING WHAT RIGHTS ARE ENFORCEABLE UNDER § 1983 IS CLEAR AND THIS COURT NEED NOT GRANT CERTIORARI IN THIS CASE TO ELABORATE ON THE ESTABLISHED LAW IN THIS AREA.

Petitioner asserts that the lower courts need further guidance in determining when enforceable rights under 42 U.S.C. § 1983 exist. In fact, the *Pennhurst* and *Wright* decisions make quite clear what standards the courts should apply in making that determination.

Petitioner argues that there is a question in the circuits concerning the relationship between the *Maine v. Thiboutot* and *Cort v. Ash* decisions which this Court

should resolve. Although Petitioner cleverly makes it appear that such confusion exists, this is simply not the case. *Maine v. Thiboutot* stands for the general proposition that causes of action under 42 U.S.C. § 1983 can be premised purely upon federal statutes, rather than requiring a basis in the Constitution. As argued above, the circuit courts have appropriately borrowed portions of the *Cort v. Ash* analysis in determining when rights asserted by Plaintiffs are rights enforceable under § 1983. Contrary to Petitioners' arguments (see Petition at 16), there is no genuine confusion in the circuit courts concerning the relationship between *Thiboutot* and *Cort*.

Petitioner also alleges further confusion in the lower courts. Petitioner states that courts other than the Eleventh Circuit have readily proceeded to enforce Title IV-A and IV-D in cases brought under § 1983. Petition at 19. However, in none of the cases cited by Petitioner at page 19 was the issue of whether a cause of action existed under § 1983 raised. In each of those cases, no mention was made of whether a cause of action under § 1983 existed. Those cases cannot, therefore, be used to show a split of authority among the circuits on the issue raised in this Petition.

Petitioner also alludes to further divergence of opinion among the circuits in deciding whether enforceable rights exist under § 1983. See Petition at 19-24. Instead of showing a dichotomy in the reasoning of the circuit courts, the cases cited by Petitioner represent different results under different statutes. *Clallam County v. Department of Transportation of the State of Washington*, 849 F.2d 424 (9th Cir. 1988), *cert. denied* 190 S.Ct. 790 (1989) (considering the Federal-Aid Highway Act, 23 U.S.C. § 101 *et*

seq., especially §§ 124(8), 301); *West Virginia University Hospitals, Inc. v. Casey*, 885 F.2d 11 (3rd Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3430 (U.S. Dec. 22, 1989) (No. 89-994) (considering the Medicaid Act, 42 U.S.C. § 1396 et seq., especially § 1396a(a)(13)(A)); *Edwards v. District of Columbia*, 821 F.2d 651 (D.C. Cir. 1987) (considering the United States Housing Act of 1937, 42 U.S.C. §§ 1437-1440, especially § 1437p); *Allandale Neighborhood Association v. Austin Transportation Study Policy Advisory Committee*, 840 F.2d 258 (5th Cir. 1988) (considering the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1607 and 23 U.S.C. § 134). Clearly, one would expect different results, and somewhat different analyses, when courts are examining different statutes to determine whether enforceable rights exist.

In sum, any divergence of opinions in this area lies more in the Petitioner's disingenuous categorization of the cases than in reality or is explained by the differences in the particular statutes under consideration. Whatever difference in analysis of enforceable rights issues exists among the circuits is minimal and does not warrant this Court's attention through the granting of certiorari. Additionally, if this Court feels that any further clarification of the issue of when enforceable rights exist under § 1983 is warranted, the Court already has a vehicle for doing that in the case of *Baliles v. Virginia Hospital Assoc.*, No. 88-2043 (argued January 9, 1990).

III. PETITIONER HAS NOT ASSERTED A DUE PROCESS CLAIM WHICH WOULD REQUIRE THE GRANT OF CERTIORARI.

Petitioner alleges that Respondent's administration of the child support recovery program has violated her

right to property secured by the due process clause of the fourteenth amendment. She argues that she was deprived of the economic benefit of child support collections to which she was entitled by the Social Security Act. (Petition at 37-38). Petitioner further suggests that the Eleventh Circuit erred in failing to reach this issue.

Petitioner's due process argument is in fact merely a rewording of her statutory arguments. Because the property rights which she alleges stem solely from the statutes upon which she relies for her enforceable rights under 42 U.S.C. § 1983, her due process argument is in fact synonomous with her statutory argument. That is, Petitioner has no property rights separate and apart from the Child Support Enforcement Act. The Eleventh Circuit properly resolved Petitioner's arguments under the statute and, in so doing, of necessity resolved Petitioner's due process claims. In keeping with long-standing precedent that the federal courts will not pass on constitutional issues where statutory construction will resolve the issue, *see, e.g., United States v. Clark*, 445 U.S. 23, 27 (1979), the Eleventh Circuit appropriately did not address Petitioner's constitutional claims. As such, this Court need not grant certiorari to resolve Petitioner's due process claims.

IV. CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to review the decision of the United States

Court of Appeals for the Eleventh Circuit should be denied.

Respectfully submitted,

MICHAEL J. BOWERS
Attorney General

H. PERRY MICHAEL
Executive Assistant
Attorney General

STEPHANIE B. MANIS
Deputy Attorney General

WILLIAM C. JOY
Senior Assistant Attorney General

MARY FOIL RUSSELL
Assistant Attorney General

PLEASE ADDRESS ALL
COMMUNICATIONS TO:

MARY FOIL RUSSELL
Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334
Telephone: (404) 656-3334

No. 89-1030

(4)

FILED

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JOSEPH F. SPANIOL, JR.
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In The

Supreme Court of the United States

October Term, 1989

GWENDOLYN BROWN,

Petitioner,

v.

JAMES G. LEDBETTER,

Respondent.

APPENDIX OF RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MICHAEL J. BOWERS
Attorney General

H. PERRY MICHAEL
Executive Assistant Attorney General

STEPHANIE B. MANIS
Deputy Attorney General

WILLIAM C. JOY
Senior Assistant Attorney General

MARY FOIL RUSSELL
Assistant Attorney General
Counsel of Record for Respondent

132 State Judicial Building
Atlanta, Georgia 30334
(404) 656-3334

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOY D. WEHUNT, Plaintiff vs. JAMES G. LEDBETTER, in his capacity as Commissioner of the Georgia Department of Human Resources, and MARGARET M. HECKLER, in her capacity as Secretary of the United States Department of Health and Human Services, Defendants	CIVIL ACTION NO. C85-2891A

COMPLAINT
(Filed May 9, 1985)
PRELIMINARY STATEMENT
-1-

Plaintiff JOY D. WEHUNT seeks declaratory and injunctive relief for violations of her civil rights under Title IV of the Social Security Act, 42 U.S.C. Sections 601 *et seq.* (hereinafter, "title IV-A), and 651 *et seq.* (hereinafter, "Title IV-D"). The Title IV-A program provides federal funds to participating states for the provision of financial assistance to families whose available income and resources are insufficient to meet costs of necessary living

expenses. The Title IV-D program provides for the establishing paternity of children; locating absent parents; and obtaining child support for the children of absent parents.

-2-

Plaintiff alleges that Defendant Ledbetter has failed in his obligations under the provisions of the Act to establish paternity on her child's behalf; to collect child support; and to locate the absent parent of her child. Plaintiff further alleges that Defendant Ledbetter has adopted a definition of "child support" which imposes requirements beyond that of Title IV-A, with the result that amounts paid to Plaintiff by the absent parent of her child have been determined to be a mere "contribution" and not "child support" and thus not entitled to the $50.00 child support disregard established by Title IV-A. Plaintiff alleges that Defendant Heckler has failed in her duty to oversee the operation of state plans under Titles IV-A and IV-D and to ensure that Defendant Ledbetter complies with the conditions of participation by the State of Georgia in the AFDC program.

-3-

Plaintiff seeks declaratory and injunctive relief for Defendants' failure to meet their obligations to Plaintiff under Titles IV-A and IV-D to establish paternity of her child and to assist Plaintiff in securing child support from the absent parent of her child; and for Defendant Ledbetter's promulgation of policies under the Georgia AFDC program which are contrary to and in excess of the authority granted by the Act. Plaintiff further seeks

declaratory and injunctive relief with regard to Defendant Heckler's failure to properly oversee Defendant Ledbetter's operation of the AFDC program in the State of Georgia according to the requirements of Title IV-A.

JURISDICTION
-4-

This Court has jurisdiction of this matter by virtue of 28 U.S.C. Section 1331, in that it is an action arising under the laws of the United States. Plaintiff's claims are authorized by 42 U.S.C. Section 1983; declaratory relief is sought pursuant to 28 U.S.C. Sections 2201 and 2202.

VENUE
-5-

Venue properly lies in this District pursuant to 28 U.S.C. Section 1391.

PARTIES
PLAINTIFF
-6-

Plaintiff is a resident and a citizen of Georgia and of the United States. She is the mother of two minor children, both of whom were eligible for benefits under the AFDC program at the time this cause of action arose.

DEFENDANTS
-7-

Defendant James G. Ledbetter, Ph.D., is Commissioner of the Georgia Department of Human Resources. Pursuant to Acts of the State of Georgia, 1972, p. 1015

(O.C.G.A. Section 49-2-1), Defendant Ledbetter has the responsibility to supervise, direct, account for, organize, plan, administer and execute the functions of the Georgia Department of Human Resources. At all times relevant hereto, Defendant Ledbetter was in the exercise of his official duties.

-8-

Defendant MARGARET M. HECKELR is the Secretary of the United States Department of Health and Human Services. As Secretary, she is charged with the federal administration and operation of the Title IV-A program; for adopting and implementing AFDC policies, rules, and regulations which must comply with controlling federal statutes; and for overseeing the states' operation of AFDC programs. Pursuant to 42 U.S.C. Section 652, as amended, it is the duty of the Defendant Secretary to review and approve state plans for child support recovery and establishment of paternity and to evaluate the implementation of state programs established pursuant to these state plans. At all times relevant hereto Defendant Heckler was in the exercise of her official duties.

STATUTORY FRAMEWORK

-9-

The AFDC Program is a cooperative federal-state grant-in-aid program whereby the federal government contributes funds to be used by the states along with other state money to provide cash and other benefits to

families with dependent children. The rules and regulations which apply to states administering the Title IV-A program are set forth at 42 U.S.C. Section 601 *et seq.* and 45 C.F.R. Part 201 *et seq.*

-10-

In 1974, federal law respecting the enforcement and collection of child support from absent parents was designated Title IV-D of the Social Security Act. Title IV-D, the Federal Child Support and Establishment of Paternity Act, 42 U.S.C. Sections 651 *et seq.*, was subsequently amended to strengthen provisions regarding locating absent parents, establishing paternity and securing support for children. The regulations implementing the Title IV-D program are set forth at 45 C.F.R. Parts 301 *et seq.*

-11-

Under 42 U.S.C. Section 654, as amended, a state plan for child and spousal support must provide that the state will undertake to establish paternity for any child born out of wedlock, where there is an effective assignment of the right to support of a child receiving AFDC under 42 U.S.C. Section 602(a) (26).

-12-

By accepting public assistance on behalf of a child, an AFDC recipient in Georgia is required to make an assignment to the Department of Human Resources of the right to any child support owed to the child. 42 U.S.C. Section 602(a) (26); O.C.G.A. Section 19-11-7.

-13-

Section 2640 of the federal Deficit Reduction Act of 1984, P. L. 98-369 (hereinafter, "DEFRA"), provides that for purposes of calculating the amount of AFDC to which a family is entitled, the first $50 of any child support payments received by the family in any month should be disregarded. A copy of the relevant DEFRA sections is attached hereto as Exhibit "A", pages 1 and 2.

-14-

Defendant Ledbetter promulgated policies implementing DEFRA in Georgia Department of Human Resources Eligibility Services County Letter 84-44. A copy of the relevant page of Eligibility Services County Letter 84-44 is attached hereto as Exhibit "B".

-15-

Eligibility Services County Letter 84-44 provides for the $50 disregard to be applied to child support paid by an absent parent, whether the child support is paid directly to the AFDC recipient or to the state Office of Child Support Recovery (OCSR). The disregard applies only to "child support" and not to "contributions." Only money that is paid by either a "legally obligated parent" or "a natural father who signs a statement that he is the father of the child(ren) and there is no legal father involved" are considered "child support" under the definition adopted by Defendant Ledbetter. All other moneys are defined as "contributions" and thus not entitled to the $50 disregard.

FACTUAL ALLEGATIONS

-16-

Plaintiff Joy D. Wehunt is the mother of two children. The older of these children was receiving AFDC at the time Plaintiff became pregnant with her second child.

-17-

Plaintiff's second child, Tiffany Wehunt, was born out of wedlock; paternity of this child has never been established by a court of law or by acknowledgement of paternity.

-18-

Approximately three months prior to the birth of her second child, Plaintiff swore out an abandonment warrant against Bruce Burch, who fathered the child she was carrying. Burch was arraigned in State Court in Stephens County, Georgia, on or about October 1, 1983, and pleaded not guilty.

-19-

Upon Burch's request, the state court judge ordered that the human leukocyte antigen (HLA) blood test be performed on Burch; the Plaintiff herein; and the minor child fathered by Burch. The HLA test was scheduled by court order for June 5, 1984.

-20-

After the birth of the child Tiffany on December 3, 1983, Plaintiff requested that the child be added to her AFDC grant.

-21-

As a condition of receiving AFDC for this child, Plaintiff was required to assign her rights to child support from Tiffany's father to the State of Georgia. Plaintiff signed an application for AFDC which stated in part:

> "I understand that Georgia Law requires the Department of Human Resources to take necessary action to establish paternity and collect child support money from responsible absent parents . . . I further understand that by the act of accepting public assistance I am assigning any right I have to child support monies to the Division of Family and Children Services. I know that action to collect child support from the absent parent will be taken with or without my permission. . . ."

-22-

During the spring of 1984, Burch agreed to begin paying child support to Plaintiff for Tiffany if Plaintiff would agree to dismissal of the abandonment warrant against him.

-23-

Tiffany was removed from the AFDC grant group, at Plaintiff's request, once Burch began paying the child support.

-24-

On or about June 2, 1984, three days prior to the court-ordered HLA blood test, Burch paid the $55.00 accrued costs for dismissal of the Plaintiff's abandonment warrant against him.

-25-

On or about July 7, 1984, the Judge of the State Court of Stephens County, Georgia, signed an order of dismissal of Plaintiff's abandonment warrant upon motion of the State Court Solicitor.

-26-

Plaintiff requested the Franklin County Department of Family and Children Services to remove Tiffany from her AFDC grant once Burch began paying child support for Tiffany.

-27-

Burch paid to Plaintiff the sum of $20 per week for Tiffany's support and continued to pay this sum to Plaintiff through the month of September, 1984.

-28-

In September, 1984, the Franklin County Department of Family and Children Services (DFCS) advised Plaintiff that under Eligibility Services County Letter 84-44, the child Tiffany must be added to the AFDC grant and the

child support she received be counted in the budgeting of the AFDC amount.

-29-

The Franklin County DFCS also advised Plaintiff that $50 per month of the child support payments she was receiving could be disregarded for purposes of her AFDC grant amount.

-30-

The Franklin County DFCS also told Plaintiff that before she would be entitled to the $50 disregard, she would be required to secure a signed statement acknowledging paternity from the putative father who was paying the $20 per week support to Tiffany.

-31-

The Plaintiff asked Burch to sign such a statement but he refused to do so, and, furthermore, stopped making child support payments to Plaintiff in September, 1984.

-32-

Neither the Franklin County DFCS nor any other agency or agent of the Defendant Ledbetter or of the Georgia Department of Human Resources has taken appropriate action, legal or otherwise, to secure a determination of paternity of Plaintiff's minor child Tiffany or to secure child support.

-33-

Due to the AFDC budgeting process, which requires a determination of the amount of the current monthly grant based upon income received in the previous month, the Franklin County DFCS in October, 1984, notified Plaintiff that she had received an overpayment in AFDC benefits due to the refusal of the putative father to sign a statement admitting paternity.

-34-

Plaintiff has received no further child support from her child's father since his last payment in late September, 1984. On her own initiative, Plaintiff has since sworn out another abandonment warrant but does not know whether it has been served or otherwise disposed of.

-35-

Upon information and belief, Tiffany's father has moved from the geographic area in which Plaintiff resides but is residing in the State of Georgia.

-36-

The Franklin County DFCS is attempting to collect from Plaintiff the alleged AFDC overpayment from October, 1984.

-37-

Plaintiff has exhausted the administrative review process of the Georgia Department of Human Resources.

The decision of the Franklin County Department of Family and Children Services, finding an overpayment in Plaintiff's AFDC benefits, has been upheld by Defendant Ledbetter's hearing officer and hearing officer for final appeals.

-38-

Upon information and belief, Defendant Heckler failed to assure that the State of Georgia or Defendant Ledbetter complied with the regulations and statutory provisions governing Title IV-A.

-39-

Upon information and belief, Defendant Heckler failed to assure that the State of Georgia or Defendant Ledbetter complied with the regulations and statutory provisions governing Title IV-D.

CLAIMS FOR RELIEF
FIRST CLAIM – IV-D, STATUTE
-40-

Defendant Ledbetter has failed to undertake to establish the paternity or to seek and recover child support for the Plaintiff's child born out of wedlock, as required by 42 U.S.C. Sections 602(a) (26) and 654(4) (A).

SECOND CLAIM – IV-D, REGULATIONS
-41-

Defendant Ledbetter has failed to undertake to establish the paternity or to seek and recover child support for the Plaintiff's child born out of wedlock, as required by 45 C.F.R. Section 303.5.

THIRD CLAIM – IV-A, STATUTE

-42-

Plaintiff has a right to receive AFDC if eligible according to the conditions established under 42 U.S.C. Sections 601 *et seq.* and permissible conditions established pursuant thereto.

-43-

By instituting the policy set out in the aforementioned Eligibility Services County Letter, Defendant Ledbetter infringed upon the Plaintiff's rights, by depriving her of the benefit of the $50 disregard and further by wrongfully declaring her to have been overpaid for amounts that should have been disregarded pursuant to Title IV-A and DEFRA.

FOURTH CLAIM – IV-A, REGULATIONS

-44-

Plaintiff has a right to receive AFDC if eligible according to the conditions established under 45 C.F.R. Part 201 *et seq.* and permissible conditions established pursuant thereto.

-45-

By instituting the policy set out in the aforementioned Eligibility Services County Letter, Defendant Ledbetter infringed upon the Plaintiff's rights, by depriving her of the benefit of the $50 disregard and further by wrongfully declaring her to have been overpaid for amounts that should have been disregarded pursuant to Title IV-A and DEFRA.

FIFTH CLAIM – FUNDAMENTAL UNFAIRNESS

-46-

By requiring Plaintiff to assign to the State of Georgia and Defendant Ledbetter her right to child support monies collected from Tiffany's father, and by failing thereafter to take action to establish paternity and collect support for Tiffany, Defendant Ledbetter has impaired Plaintiff's right to receive support for her child.

-47-

Defendant Ledbetter's illegal definition of "child support," enacted pursuant to DEFRA, deprived Plaintiff of the $50 child support disregard provided by federal law, to its financial benefit, and to Plaintiff's financial detriment.

-48-

Defendant Ledbetter's actions were fundamentally unfair and, therefore, a denial of Plaintiff's right to due process of law, guaranteed to her through the Fourteenth Amendment to the United States Constitution.

SIXTH CLAIM – IV-A OVERSIGHT

-49-

Defendant Heckler's failure to assure that the State of Georgia and Defendant Ledbetter have complied with the regulations and statutory provisions governing Title IV-A has deprived the Plaintiff of rights accruing to her pursuant to 42 U.S.C. Sections 601 *et seq.* and 45 C.F.R. Part 201 *et seq.* 1984 amendments to the Act, by the State of Georgia.

SEVENTH CLAIM – IV-D OVERSIGHT
-50-

Defendant Heckler's failure to assure that the State of Georgia and Defendant Ledbetter have complied with the regulations and statutory provisions governing Title IV-D has deprived the Plaintiff of rights accruing to her pursuant to 42 U.S.C. Sections 651 *et seq.* and 45 C.F.R. Part 301 *et seq.*

EQUITY
-51-

As a result of Defendants' failure to comply with their obligations under the Social Security Act, Plaintiff has suffered severe and irreparable injury, in that Plaintiff has lost the regular payment of child support for Tiffany following Defendant Ledbetter's requirement that Plaintiff secure from Tiffany's father a signed statement acknowledging paternity, rather than initiating paternity and support recovery proceedings himself or through his agents against Tiffany's father. Plaintiff has suffered further injury in that she is without funds herself to retain counsel to initiate paternity proceedings on her behalf, and Defendant Ledbetter has failed to initiate such proceedings. Plaintiff has suffered further injury in that Defendant Ledbetter has denied that payments made for Tiffany's supportare child support, and Plaintiff has thus lost the benefit of the $50 disregard of child support established by federal law. Furthermore, Defendant Ledbetter is attempting to recover from Plaintiff an alleged overpayment of benefits which would not have occurred but for Defendant Ledbetter's illegal definition of "child support."

Plaintiff has no adequate remedy at law to redress the stated violations of her rights by Defendants. Plaintiff will continue to suffer irreparable harm unless and until the declaratory and injunctive relief sought herein by her is granted by this Court.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Joy D. Wehunt prays that this Court:

A. Assume jurisdiction of this action;

B. Declare that the acts and practices of Defendant Ledbetter in failing to initiate paternity and enforcement of support proceedings on Plaintiff's behalf have subjected Plaintiff to a deprivation of her rights under the Social Security Act, 42 U.S.C. Section 601 *et seq.*;

C. Declare that the acts and practices of Defendant Ledbetter in impositing additional requirements upon the definition of "child support" have subjected Plaintiff to a deprivation of her rights under the Social Security Act;

D. Declare that the acts and practices of Defendant Ledbetter in failing to notify Plaintiff of the result of her assignment of her rights to collect child support to the State of Georgia are fundamentally unfair to Plaintiff contrary to her rights under the Constitution of the United States;

E. Declare that the acts and practices of Defendant Heckler in failing to properly or adequately review and monitor the State of Georgia's operation of the child

support recovery program and the AFDC program, and have subjected Plaintiff to a deprivation of her rights under 42 U.S.C. Sections 601 *et seq.* and 651 *et seq.;*

F. Issue a preliminary and permanent injunction requiring Defendant Ledbetter to initiate and conclude paternity proceedings on behalf of Plaintiff's child Tiffany;

G. Issue a preliminary and permanent injunction requiring Defendant Ledbetter to initiate and conclude recovery of child support proceedings on behalf of Plaintiff's child Tiffany;

H. Issue a preliminary and permanent injunction requiring Defendant Ledbetter to refrain from attempting to collect from Plaintiff a claimed overpayment of AFDC benefits, or taking any future action against Plaintiff based upon Defendant Ledbetter's illegal definition of "child support";

I. Issue a preliminary and permanent injunction requiring Defendant Heckler to properly review, evaluate and supervise Defendant Ledbetter's actions under the Georgia Title IV-A (AFDC) program;

J. Issue a preliminary and permanent injunction requiring Defendant Heckler to properly review, evaluate and supervise Defendant Ledbetter's actions under the Georgia Title IV-D (Child Support Recovery) program;

K. Retain jurisdiction over Defendants until such time as the Court is satisfied that the practices, policies and omissions alleged herein are corrected and will not recur;

L. Assess all costs of this action against Defendants;

M. Award Plaintiff reasonable attorney's fees; and

M. Grant to Plaintiff such other and additional relief as this Court deems appropriate and just under the circumstances.

/s/ Kay A. Giese
KAY A. GIESE (GBN 293212)

P.O. Box 8044
Athens, Georgia 30603
(414) 542-2031

/s/ John Riemer by Kag
JOHN RIEMER (GBN 605425)

P.O. Drawer 1337
Gainesville, Georgia 30503
(404) 535-5717

/s/ Nancy Lindbloom by Kag
NANCY LINDBLOOM
(GBN 452912)

P. O. Drawer 1337
Gainesville Georgia 30503
(404) 535-5717

/s/ Phyllis J. Holmen by Kag
PHYLLIS J. HOLMEN
(GBN 363850)
JOHN L. CROMARTIE, JR.
(GBN 197200)

133 Luckie Street, N.W.
8th Floor
Atlanta, Georgia 30303
(404) 656-6021

Attorneys for Plaintiff

EXHIBIT "A"

* * *

PARENTS AND SIBLINGS OF DEPENDENT CHILD INCLUDED IN AFDC FAMILY; CHILD SUPPORT PAYMENTS

SEC. 2640. (a) Section 402(a) of the Social Security Act (as amended by section 2624 of this Act) is further amended–

(1) by striking out "and" at the end of paragraph (36);

(2) by striking out the period at the end of paragraph (37) and inserting in lieu thereof"; and"; and

(3) by inserting immediately after paragraph (37) the following new paragraphs;

"(38) provide that in making the determination under paragraph (7) with respect to a dependent child and applying paragraph (8), the State agency shall (except as otherwise provided in this part) include–

"(A) any parent of such child, and

"(B) any brother or sister of such child, if such brother or sister meets the conditions described in clauses (1) and (2) of section 406(a), if such parent, brother, or sister is living in the same home as the dependent child, and any income of or available for such parent, brother, or sister shall be included in making such determination and applying such paragraph with respect to the family (notwithstanding section 205(j), in the case of benefits provided under title II); and

"(39) provide that in making the determination under paragraph (7) with respect to a dependent child whose parent or legal guardian

is under the age selected by the State pursuant to section 406(a)(2), the State agency shall (except as otherwise provided in this part) include any income of such minor's own parents or legal guardians who are living in the same home as such minor and dependent child, to the same extent that income of a stepparent is included under paragraph (31).".

(b)(1) Section 457(b) of such Act is amended by redesignating paragraphs (1), (2), and (3) as paragraphs (2), (3), and (4), respectively, and by inserting immediately before the paragraph redesignated as paragraph (2) the following new paragraph:

"(1) the first $50 of such amounts as are collected periodically which represent monthly support payments shall be paid to the family without affecting its eligibility for assistance or decreasing any amount otherwise payable as assistance to such family during such month;".

(2) Section 457(b) of such Act, as amended by paragraph (1) of this subsection, is further amended–

(A) by inserting "which are in excess of any amount paid to the family under paragraph (1) and" after "peridocially" in paragraph (2);

(B) by striking out "paragraph (1)" in paragraph (3) and inserting in lieu thereof "paragraph (2)"; and

(C) by striking out "paragraphs (1) and (2)" in paragraph (4) and inserting in lieu thereof "paragraphs (1), (2), and (3)".

(c) Section 402(a)(8)(A) of such Act is amended by striking out "and" after the semicolon at the end of clause (iv), and by adding after clause (v) the following new clause:

"(vi) shall disregard the first $50 of any child support payments received in such month with respect to the dependent child or children in any family applying for or receiving aid to families with dependent children (including support payments collected and paid to the family under section 457(b)); and".

* * *

EXHIBIT "B"

Fifty Dollar Child Support Disregard

CHILD SUPPORT DISREGARD

Beginning October 1, 1984, there will be a $50 disregard applied to child support paid by an absent parent(s). This disregard applies too both child support that is received by an A/R directly and child support that is paid to the Office of Child Support Recovery (OCSR). The $50 disregard is:

- Applied to total amount of the child support received by a family, regardless of the number of AP's that may be paying support.
- Applied prior to eligibility determination and grant determination; i.e., prior to the ceiling test.

This disregard *only* applies to child support, not contributions. *Child support* will be defined as any money that is paid by:

- A legally obligated parent; or
- A natural father who signs a statement that he is the father of the child(ren) and there is no legal father involved.

Contributions are any money that is paid by:

- A natural father when there is also a legal father; or
- A natural father when there is not a legal father, but the natural father has not signed a statement admitting paternity; or
- Another individual besides the parent who provides income to the A/R.

When the EW is verifying the amount of child support that is paid, if the support is not from a legally obligated parent, the EW should also get a signed statement from the parent admitting paternity. Without a signed statement, the support will be considered as a contribution and the $50 disregard will not apply. The EW should explain to the A/R the advantages of having the parent sign a statement of paternity.

This $50 disregard also applies to child support received by children in title IV-E Foster care

Procedure

A. *Direct Child Support or Budgeted Child Support Income* (BCSI)

For cases on retrospective budgeting, the $50 disregard will apply to the child support that was received by the recipient in August, 1984.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

JOY D. WEHUNT, GWENDOLYN BROWN, and BRENDA WHITE, *et al.* Plaintiffs vs. JAMES G. LEDBETTER, in his capacity as Commissioner of the Georgia Department of Human Resources, and MARGARET M. HECKLER, in her capacity as Secretary of the United States Department of Health and Human Services, Defendants	CIVIL ACTION NO. C85-2891A

PLAINTIFF'S FIRST AMENDED COMPLAINT

Pursuant to F.R.C.P. Rule 15(a), Plaintiff JOY D. WEHUNT amends her complaint by substituting the following in its entirety for the complaint originally filed:

PRELIMINARY STATEMENT

-1-

This is an action on behalf of plaintiffs JOY D. WEHUNT, BRENDA WHITE, and GWENDOLYN BROWN, and the class they represent, who seek declaratory and injunctive relief for violations of their civil rights under Title IV of the Social Security Act, 42 U.S.C. Sections 601 *et seq.* (hereinafter, "Title IV-A), and 651 *et seq.* (hereinafter, "Title IV-D"). The Title IV-A program provides federal funds to participating states for the provision of financial assistance to families whose available income and resources are insufficient to meet costs of necessary living expenses. The Title IV-D program provides for establishing paternity of children; locating absent parents; and obtaining child support for the children of absent parents.

-2-

(a) Plaintiffs JOY D. WEHUNT and GWENDOLYN BROWN, and the class they represent, allege that Defendant Ledbetter has failed in his obligations under the provisions of the Act to establish paternity on behalf of their children, TIFFANY RENEE WEHUNT and KATEIA NICOLE PINKSTON.

(b) Plaintiffs JOY D. WEHUNT, GWENDOLYN BROWN, and BRENDA WHITE, and the class they represent, allege that Defendant Ledbetter has failed in his obligations under the provisions of the Act to collect child support from the absent parents of their children; and to locate the absent fathers of their children.

(c) Plaintiff JOY D. WEHUNT and the class she represents, further allege that Defendant Ledbetter has adopted a definition of "child support" which imposes requirements beyond that of Title IV-A, with the result that amounts paid to Plaintiff JOY D. WEHUNT and the class she represents, by absent parents of their children, have been determined to be mere "contributions" and not "child support" and thus not entitled to the $50.00 child support disregard established by Title IV-A.

(d) Plaintiffs JOY D. WEHUNT, BRENDA WHITE, and GWENDOLYN BROWN, and the class they represent, allege that Defendant Heckler has failed in her duty to oversee the operation of Georgia's state plans under Titles IV-A and IV-D and to ensure that Defendant Ledbetter complies with the conditions of participation by the State of Georgia in the AFDC program.

-3-

(a) Plaintiffs JOY D. WEHUNT and GWENDOLYN BROWN, and the class they represent, seek declaratory and injunctive relief for Defendants' failure to meet their obligations to Plaintiffs WEHUNT and BROWN, and the class they represent, under Titles IV-A and IV-D to establish paternity of certain of their children.

(b) Plaintiffs JOY D. WEHUNT, GWENDOLYN BROWN and BRENDA WHITE, and the class they represent, seek declaratory and injunctive relief for Defendants' failure to assist them in securing child support from the absent parents of their children.

(c) Plaintiff JOY D. WEHUNT and the class she represents, seek declaratory and injunctive relief for Defendant Ledbetter's promulgation of policies under the Georgia AFDC program which are contrary to and in excess of the authority granted by the Act.

(d) Plaintiffs WEHUNT, BROWN and WHITE, and the class they represent, further seek declaratory and injunctive relief with regard to Defendant Heckler's failure to properly oversee Defendant Ledbetter's operation of the AFDC program in the State of Georgia according to the requirements of Titles IV-A and IV-D.

JURISDICTION
-4-

This Court has jurisdiction of this matter by virtue of 28 U.S.C. Section 1331, in that it is an action arising under the laws of the United States. Plaintiffs' claims are authorized by 42 U.S.C. Section 1983. Declaratory relief is sought pursuant to 28 U.S.C. Sections 2201 and 2202.

VENUE
-5-

Venue properly lies in this District pursuant to 28 U.S.C. Section 1391.

PARTIES
PLAINTIFFS
-6-

Plaintiffs JOY D. WEHUNT is a resident and a citizen of Georgia and of the United States. She is the mother of

two minor children, both of whom were eligible for benefits under the Aid to Families with Dependent Children (AFDC) program at the time this cause of action arose.

-7-

Plaintiff GWENDOLYN BROWN is a resident and a citizen of Georgia and of the United States. She is the mother of three minor children, the oldest of whom was born out of wedlock. All three of Plaintiff GWENDOLYN BROWN'S minor children were eligible for benefits under the AFDC program at the time this cause of action arose.

-8-

Plaintiff BRENDA WHITE is a resident and a citizen of Georgia and of the United States. She is the mother of three minor children, all of whom were born while Plaintiff BRENDA WHITE was married to William H. White, although Plaintiff BRENDA WHITE's minor child MARK A. WHITE is not the natural child of William H. White. Plaintiff BRENDA WHITE receives child support from the father of MARK A. WHITE. Plaintiff BRENDA WHITE's two minor children SONJA D. WHITE and STEPHEN A. WHITE were eligible for benefits under the AFDC program at the time this cause of action arose.

DEFENDANTS

-9-

Defendant James G. Ledbetter, Ph.D., is Commissioner of the Georgia Department of Human Resources. Pursuant to Acts of the State of Georgia, 1972, p. 1015

(O.C.G.A. Section 49-2-1), Defendant Ledbetter has the responsibility to supervise, direct, account for, organize, plan, administer and execute the functions of the Georgia Department of Human Resources. At all times relevant hereto, Defendant Ledbetter was in the exercise of his official duties.

-10-

Defendant MARGARET M. HECKLER is the Secretary of the United States Department of Health and Human Services. As Secretary, she is charged with the federal administration and operation of the Title IV-A program; for adopting and implementing AFDC policies, rules, and regulations which must comply with controlling federal statutes; and for overseeing the states' operation of AFDC programs. Pursuant to 42 U.S.C. Section 652, as amended, it is the duty of the Defendant Secretary to review and approve state plans for child support recovery and establishment of paternity and to evaluate the implementation of state programs established pursuant to these state plans. At all times relevant hereto Defendant Heckler was in the exercise of her official duties.

STATUTORY FRAMEWORK

-11-

The AFDC Program is a cooperative federal-state grant-in-aid program whereby the federal government contributes funds to be used by the states along with other state money to provide cash and other benefits to

families with dependent children. The rules and regulations which apply to states administering the Title IV-A program are set forth at 42 U.S.C. Section 601 *et seq.* and 45 C.F.R. Part 201 *et seq.*

-12-

In 1974, federal law respecting the enforcement and collection of child support from absent parents was designated Title IV-D of the Social Security Act. Title IV-D, the Federal Child Support and Establishment of Paternity Act, 42 U.S.C. Sections 651 *et seq.*, was subsequently amended to strengthen provisions regarding locating absent parents, establishing paternity and securing support for children. The regulations implementing the Title IV-D program are set forth at 45 C.F.R. Parts 301 *et seq.*

-13-

Under 42 U.S.C. Section 654, as amended, a state plan for child and spousal support must provide that the state will undertake to establish paternity for any child born out of wedlock, where there is an effective assignment of the right to support of a child receiving AFDC under 42 U.S.C. Section 602(a)(26).

-14-

By accepting public assistance on behalf of a child, an AFDC recipient in Georgia is required to make an assignment to the Department of Human Resources of the right to any child support owed to the child. 42 U.S.C. Section 602(a)(26); O.C.G.A. Section 19-11-6.

-15-

Section 2640 of the federal Deficit Reduction Act of 1984, P. L. 98-369 (hereinafter, "DEFRA"), provides that for purposes of calculating the amount of AFDC to which a family is entitled, up to the first $50 of any child support payments received by the family in any month should be disregarded. A copy of the relevant DEFRA sections is attached hereto as EXHIBIT "A", pages 1 and 2.

-16-

Defendant Ledbetter promulgated policies implementing DEFRA in Georgia Department of Human Resources Eligibility Services County Letter 84-44. A copy of the relevant page of Eligibility Services County Letter 84-44 is attached hereto as Exhibit "B".

-17-

Eligibility Services County Letter 84-44 provides for the $50 disregard to be applied to child support paid by an absent parent, whether the child support is paid directly to the AFDC recipient or to the state Office of Child Support Recovery (OCSR). The disregard applies only to "child support" and not to "contributions." Only money that is paid by either a "legally obligated parent" or "a natural father who signs a statement that he is the father of the child(ren) and there is no legal father involved" are considered "child support" under the definition adopted by Defendant Ledbetter. All other moneys

are defined as "contributions" and thus not entitled to the $50 disregard.

CLASS ACTION ALLEGATIONS
-18-

Plaintiffs JOY D. WEHUNT, GWENDOLYN BROWN, and BRENDA WHITE bring this action on behalf of themselves, and, pursuant to Federal Rules of Civil Procedure 23(a) and (b)(2), and pursuant to Local Rule 220, on behalf of all other AFDC recipients similarly situated in the State of Georgia. The plaintiff class is composed of past, present and future AFDC recipients in Georgia whose receipt of AFDC benefits is based upon the absence from the household of parents of minor children in the household.

The plaintiff class consists of three subclasses:

(a) The first, represented by plaintiff JOY D. WEHUNT, is composed of all AFDC recipients past, present or future, who, since August 1, 1984, have received or are receiving monetary payments from the absent parents of their minor children, for whom no court finding or acknowledgement of paternity exists, but who have been denied the $50.00 child support disregard mandated by DEFRA pursuant to Defendant Ledbetter's policy as expressed in County Letter 84-44.

(b) The second, represented by plaintiff JOY D. WEHUNT and GWENDOLYN BROWN, is composed of all AFDC recipients, present or future, who are mothers of minor children included in plaintiffs' AFDC grants but born out of wedlock, for whom Defendants have failed to secure a determination of paternity since January, 1984,

due to Defendants' policies and practices regarding the establishment of paternity for children on AFDC.

(c) The third, represented by plaintiffs JOY D. WEHUNT, GWENDOLYN BROWN, and BRENDA WHITE, is composed of all AFDC recipients, present or future, who are parents of minor children included in plaintiffs' AFDC grants, on whose behalf paternity is established but for whom no support order has been secured since January, 1984, due to Defendants' policies and practices regarding the collection of child support for children on AFDC.

Each of the subclasses is so numerous that joinder of all members of each class is impractical. The present number of class members in each of the subclasses set forth above is unknown although Plaintiffs estimate it is in the hundreds or possibly thousands. The precise number of members in each subclass, and the identities and locations of members of the subclasses, are within the exclusive knowledge and control of Defendants. The representative parties will fairly represent and adequately protect the interests of members of each subclass as a whole, in that the claims of the representative parties are typical of those of the class as a whole. The representative parties are represented at no cost by counsel who have had extensive experience in the areas of law at issue in this litigation.

The questions of fact are generally common to each subclass. To the extent that there are factual differences, common questions of fact predominate. The claims of the named plaintiffs as to each subclass are typical of the claims of all members of each subclass in that:

(a) As to the first subclass, plaintiff AFDC recipients are being denied the $50.00 child support disregard solely due to Defendant Ledbetter's policy as expressed in Eligibility Services County Letter 84-44;

(b) As to the second subclass, plaintiff AFDC recipients have minor children whose paternity Defendants have failed to establish or have failed to diligently seek to establish, despite Defendants' statutory and regulatory obligation to do so;

(c) As to the third subclass, plaintiff AFDC recipients have minor children who are entitled to support from absent parents but Defendants have failed to secure or diligently seek to secure support from such absent parents, despite Defendants' statutory and regulatory obligation to do so.

The class action procedure is superior to other available methods for the fair and efficient adjudication of the controversies relevant to each subclass as a whole.

The defendants have acted or refused to act on grounds generally applicable to each subclass, thereby making appropriate final declaratory and corresponding injunctive relief with respect to each subclass as a whole.

FACTUAL ALLEGATIONS

-21-

Plaintiff JOY D. WEHUNT is the mother of two children. The older of these children was receiving AFDC at the time Plaintiff became pregnant with her second child.

-22-

Plaintiff's second child, Tiffany Wehunt, was born out of wedlock; paternity of this child has never been established by a court of law or by acknowledgement of paternity.

-23-

Approximately three months prior to the birth of her second child, Plaintiff WEHUNT swore out an abandonment warrant against Bruce Burch, who fathered the child she was carrying. Burch was arraigned in State Court in Stephens County, Georgia, on or about October 1, 1983, and pleaded not guilty.

-24-

Upon Burch's request, the state court judge ordered that the human leukocyte antigen (HLA) blood test be performed on Burch; Plaintiff WEHUNT; and the minor child fathered by Burch. The HLA test was scheduled by court order for June 5, 1984.

-25-

After the birth of the child Tiffany on December 3, 1983, Plaintiff WEHUNT requested that the child be added to her AFDC grant.

-26-

As a condition or receiving AFDC for this child, Plaintiff WEHUNT was required to assign her rights to child support from Tiffany's father to the State of Georgia. Plaintiff WEHUNT signed an application for AFDC which stated in part:

> "I understand that Georgia Law requires the Department of Human Resources to take necessary action to establish paternity and collect child support money from responsible absent parents . . . I further understand that by the act of accepting public assistance I am assigning any right I have to child support monies to the Division of Family and Children Service. I know that action to collect child support from the absent parent will be taken with or without my permission. . . ."

-27-

During the spring of 1984, Burch agreed to begin paying child suport to Plaintiff WEHUNT for Tiffany if Plaintiff WEHUNT would agree to dismissal of the abandonment warrant against him.

-28-

Tiffany was removed from the AFDC grant group, at Plaintiff WEHUNT's request, once Burch began paying the child support.

-29-

On or about June 2, 1984, three days prior to the court ordered HLA blood test, Burch paid the $55.00 accrued costs for dismissal of Plaintiff WEHUNT's abandonment warrant against him.

-30-

On or about July 7, 1984, the Judge of the State Court of Stephens County, Georgia, signed an order of dismissal of Plaintiff WEHUNT's abandonment warrant upon motion of the State Court Solicitor.

-31-

Plaintiff WEHUNT requested the Franklin County Department of Family and Children Services to remove Tiffany from her AFDC grant once Burch began paying child support for Tiffany.

-32-

Burch paid to Plaintiff WEHUNT the sum of $20 per week for Tiffany's support and continued to pay this sum to Plaintiff through the month of September, 1984.

-33-

In September, 1984, the Franklin County Department of Family and Children Services (DFCS) advised Plaintiff WEHUNT that under Eligibility Services County Letter 84-44, the child Tiffany must be added to the AFDC grant and the child support she received be counted in the budgeting of the AFDC amount.

-34-

The Franklin County DFCS also advised Plaintiff WEHUNT that $50 per month of the child support payments she was receiving could be disregarded for purposes of her AFDC grant amount.

-35-

The Franklin County DFCS also told Plaintiff WEHUNT that before she would be entitled to the $50 disregard, she would be required to secure a signed statement acknowledging paternity from the putative father who was paying the $20 per week support to Tiffany.

-36-

Plaintiff WEHUNT asked Burch to sign such a statement but he refused to do so, and, furthermore, stopped making child support payments to Plaintiff WEHUNT in September, 1984.

-37-

Neither the Franklin County DFCS nor any other agency or agent of the Defendant Ledbetter or of the Georgia Department of Human Resources has taken appropriate action, legal or otherwise, to secure a determination of paternity of Plaintiff WEHUNT's minor child Tiffany or to secure child support.

-38-

Due to the AFDC budgeting process, which requires a determination of the amount of the current monthly grant based upon income received in the previous month, the Franklin County DFCS in October, 1984, notified Plaintiff WEHUNT that she had received an overpayment in AFDC benefits due to the refusal of the putative father to sign a statement admitting paternity.

-39-

Plaintiff WEHUNT has received no further child support from her child's father since his last payment in late September, 1984. On her own initiative, Plaintiff WEHUNT has since sworn out another abandonment warrant but does not know whether it has been served or otherwise disposed of.

-40-

Upon information and behalf, Tiffany's father has moved from the geographic area in which Plaintiff WEHUNT resides but is residing in the State of Georgia.

-41-

The Franklin County DFCS is attempting to collect or has collected from Plaintiff WEHUNT the alleged AFDC overpayment from October, 1984.

-42-

Plaintiff WEHUNT has exhausted the administrative review process of the Georgia Department of Human Resources. The decision of the Franklin County Department of Family and Children Services, finding an overpayment in Plaintiff WEHUNT's AFDC benefits, has been upheld by Defendant Ledbetter's hearing officer and hearing officer for final appeals.

-43-

Upon information and belief, Defendant Heckler failed to assure that the State of Georgia or Defendant Ledbetter compiled with the regulations and statutory provisions governing Title IV-A.

-44-

Upon information and belief, Defendant Heckler failed to assure that the State of Georgia or Defendant Ledbetter compiled with the regulations and statutory provisions governing Title IV-D.

PLAINTIFF GWENDOLYN BROWN

-45-

Plaintiff GWENDOLYN BROWN's oldest child, KATEIA NICOLE PINKSTON, was born out of wedlock on January 22, 1977.

-46-

Kateia Nicole Pinkston's father is Clyde Baker, Jr., who, upon information and behalf, resides in Stephens County, Georgia. Plaintiff GWENDOLYN BROWN believes that Clyde Baker, Jr., has not ever been determined, by judicial action or otherwise, to be the father of Kateia Nicole Pinkston.

-47-

Plaintiff GWENDOLYN BROWN married Jerry Blane Brown on April 12, 1977.

-48-

Two children were born to plaintiff GWENDOLYN BROWN and Jerry Blane Brown: Crystal Sabrina Brown, born January 4, 1979; and Jeriquces Blane Brown, born November 1, 1980.

-49-

Plaintiff GWENDOLYN BROWN was divorced from Jerry Blane Brown by order of the Superior Court of Franklin County, Georgia, on November 23, 1982. Jerry

Blane Brown was ordered, in the final judgment and decree of divorce, to pay plaintiff GWENDOLYN BROWN the sum of $20.00 per week for each of the children Crystal Sabrina Brown and Jeriquces Blane Brown.

-50-

The absent fathers of Plaintiff BROWN's children are not paying support on behalf of their children and have failed to do so in the past.

-51-

Plaintiff GWENDOLYN BROWN began receiving AFDC on behalf of Kateia during calender year 1978, for Crystal Sabrina Brown in approximately December, 1979, and for Jeriquces Blane Brown after his birth in November, 1980.

-52-

As a condition of receiving AFDC for Kateia Pinkston, and for Crystal Sabrina and Jeriquces Blane Brown, Plaintiff GWENDOLYN BROWN was required to assign her rights to child support from the children's fathers to the State of Georgia. Plaintiff GWENDOLYN BROWN signed applications for AFDC which stated in part:

> "I understand that Georgia law requires the Department of Human Resources to take necessary action to establish paternity and collect child support money from responsible absent parents . . . I further understand that by the act of accepting public assistance I am assigning

any right I have to child support monies to the Division of Family and Children Services. I know that action to collect child support from the absent parent will be taken with or without my permission. . . ."

-53-

Despite repeated requests by Plaintiff BROWN to OCSR and to other agents and employees of Defendant Ledbetter, no action, or no adequate or effective action, has been taken to locate the absent fathers of Plaintiff BROWN's children, to determine paternity of Plaintiff BROWN's child Kateia Nicole Pinkston or to collect child support from the fathers of Plaintiff BROWN's children.

-54-

Because of the failure of Defendant Ledbetter and his agents or employees in the Child Support Recovery Unit and Child Support Enforcement Division, and even though she is a current AFDC recipient, Plaintiff BROWN has been forced to retain counsel to bring contempt proceedings against Jerry Blane Brown. Such proceeding are pending in the Superior Court of Franklin County, Georgia.

-55-

Upon information and belief, Defendant Heckler failed to assure that the State of Georgia or Defendant Ledbetter complied with the regulations and statutory provisions governing Title IV-D with regard to Plaintiff GWENDOLYN BROWN.

PLAINTIFF BRENDA WHITE

-56-

Plaintiff BRENDA WHITE is the mother of three minor children, SONJA, STEPHEN and MARK WHITE.

-57-

Plaintiff WHITE's minor children SONJA and STEPHEN WHITE are the natural children of Plaintiff WHITE's marriage to WILLIAM HENRY WHITE. Plaintiff WHITE has a child, STEPHAINE WHITE, who is the child of William Henry White but who is an adult.

-58-

Plaintiff WHITE's minor child MARK WHITE was born during Plaintiff WHITE's marriage to William Henry White but is the natural child of Bobby L. Abrams, who pays the sum of $15.00 per week toward the support of MARK WHITE.

-59-

Plaintiff WHITE separate from William Henry White in approximately June, 1968, and for the second and final time during 1969. Plaintiff WHITE's marriage to William Henry White, to the best of Plaintiff WHITE's knowledge and belief, has not been dissolved by divorce or otherwise.

-60-

Upon information and belief, Plaintiff WHITE's husband William Henry White has never been ordered by any court of competent jurisdiction to pay support for his children.

-61-

Plaintiff WHITE began receiving AFDC in the State of Georgia in approximately 1969.

-62-

Plaintiff WHITE received AFDC intermittently in Fulton and DeKalb Counties, State of Georgia, before moving to Clarke County, Georgia, in approximately June, 1983.

-63-

Plaintiff WHITE has received AFDC benefits for SONJA and STEPHEN WHITE in Clarke County, Georgia, since on or about February, 1984.

-64-

As a condition of receiving AFDC for her children, Plaintiff WHITE was required to assign her rights to child support from the father of SONJA and STEPHEN WHITE to the State of Georgia. Plaintiff WHITE signed an application for AFDC which stated in part:

> "I understand that Georgia Law requires the Department of Human Resources to take necessary action to establish paternity and collect child support money from responsible absent

parents . . . I further understand that by the act of accepting public assistance I am assigning any right I have to child support monies to the Division of Family and Children Services. I know that action to collect child support from the absent parent will be taken with or without my permission. . . ."

-65-

When Plaintiff WHITE first applied for AFDC in the State of Georgia, she provided information to employees or agents of DHR on the wherabouts of William Henry White, so that child support could be sought from him.

-66-

On the occasion of each of Plaintiff WHITE's subsequent applications for AFDC in the State of Georgia, Plaintiff WHITE was asked to provide, to employees or agents of DHR, information on the whereabouts of William Henry White, for the purpose of securing child support.

-67-

Plaintiff WHITE has provided to employees or agents of DHR all information she had on the whereabouts of William Henry White, including his last known address; the names and addresses of his relatives; his Social Security number; and his probable whereabouts.

-68-

Plaintiff WHITE does not know the present whereabouts of William Henry White.

-69-

Since her 1969 separation from William Henry White, Plaintiff WHITE has received only the sum of $200.00 from William Henry White towards the support of Plaintiff WHITE's children by William Henry White.

-70-

Despite repeated requests by Plaintiff WHITE to OCSR and to other agents and employees of Defendant Ledbetter, no action, or no adequate or effective action, has been taken to locate the absent father of Plaintiff WHITE's children, or to collect child support from the father of Plaintiff WHITE's children.

-71-

Upon information and belief, Defendant Ledbetter, and his agents and employees, failed to take any, or any effective, steps to locate William Henry White or to obtain child support for Plaintiff WHITE's children by William Henry White.

-72-

Upon information and belief, Defendant Heckler failed to assure that the State of Georgia or Defendant Ledbetter complied with the regulations and statutory

provisions governing Title IV-D with regard to Plaintiff BRENDA WHITE.

CLAIMS FOR RELIEF

FIRST CLAIM – IV-D, STATUTE

ESTABLISHMENT OF PATERNITY AND CHILD SUPPORT RECOVERY

-73-

Defendant Ledbetter has failed to undertake to establish the paternity or to seek and recover child support for the children born out of wedlock of Plaintiff WEHUNT and BROWN, and for members of the class they represent, as required by 42 U.S.C. Sections 602(a)(26) and 654(4)(A).

SECOND CLAIM – IV-D, REGULATIONS

ESTABLISHMENT OF PATERNITY AND CHILD SUPPORT RECOVERY

-74-

Defendant Ledbetter has failed to undertake to establish the paternity or to seek and recover child support for the children born out of wedlock of Plaintiffs WEHUNT and BROWN, and for members of the class they represent, as required by 45 C.F.R. Section 302.31(a)(1).

THIRD CLAIM – IV-D, STATUTE

CHILD SUPPORT RECOVERY

-75-

Defendant Ledbetter has failed to undertake to seek and recover child support for the children of Plaintiffs BROWN and WHITE and for members of the class they represent, as required by 42 U.S.C. Sections 602(a)(26), 602(a)(27), and 654(4)(B).

FOURTH CLAIM – IV-D, REGULATIONS

CHILD SUPPORT RECOVERY

-76-

Defendant Ledbetter has failed to undertake to seek and recover child support for the children of Plaintiffs BROWN and WHITE, and for members of the class they represent, as required by 45 C.F.R. Section 302.31(a)(2).

FIFTH CLAIM – IV-A, STATUTE

-77-

Plaintiff WEHUNT and members of the class she represents have a right to receive AFDC if eligible according to the conditions established under 42 U.S.C. Sections 601 *et seq.* and permissible conditions established pursuant thereto.

-78-

By instituting the policy set out in the aforementioned Eligibility Services County Letter, Defendant Ledbetter infringed upon the rights of Plaintiff WEHUNT and members of the class she represents, by depriving them of the benefit of the $50 disregard and further, with regard to Plaintiff WEHUNT, by wrongfully declaring her to have been overpaid for amounts that should have been disregarded pursuant to Title IV-A and DEFRA.

SIXTH CLAIM – IV-A, REGULATIONS

-79-

Plaintiff WEHUNT and members of the class she represents have a right to receive AFDC if eligible according to the conditions established under 45 C.F.R. Part 201 *et seq.* and permissible conditions established pursuant thereto.

-80-

By instituting the policy set out in the aforementioned Eligibility Services County Letter, Defendant Ledbetter infringed upon the rights of Plaintiff WEHUNT and members of the class she represents, by depriving them of the benefit of the $50 disregard and further, with regard to Plaintiff WEHUNT, by wrongfully declaring her to have been overpaid for amounts that should have been disregarded pursuant to Title IV-A and DEFRA.

SEVENTH CLAIM – FUNDAMENTAL UNFAIRNESS

-81-

By requiring Plaintiffs WEHUNT, BROWN and WHITE, and the classes they represent, to assign to the State of Georgia and Defendant Ledbetter their right to child support monies collected from the fathers of their children, by failing thereafter to take action to establish paternity and collect support for the children of Plaintiffs and the classes they represent, Defendant Ledbetter has impaired Plaintiffs' right to receive support for their children

-82-

Defendant Ledbetter's illegal definition of "child support," enacted pursuant to DEFRA, deprived Plaintiff WEHUNT, and the class she represents, of the $50 child support disregard provided by federal law, to its financial benefit, and to Plaintiff WEHUNT's financial detriment.

-83-

Defendant Ledbetter's actions were fundamentally unfair and, therefore, a denial to Plaintiffs WEHUNT, BROWN and WHITE, and the classes they represent, of the right to due process of law, guaranteed to them through the Fourteenth Amendment to the United States Constitution.

EIGHTH CLAIM – IV-A OVERSIGHT

-84-

Defendant Heckler's failure to assure that the State of Georgia and Defendant Ledbetter have complied with the regulations and statutory provisions governing Title IV-A has deprived Plaintiff WEHUNT, and the class she represents, of rights accruing to them pursuant to 42 U.S.C. Sections 601 *et seq.* and 45 C.F.R. Part 201 *et seq.* 1984 amendments to the Act, by the State of Georgia.

NINTH CLAIM – IV-D OVERSIGHT

-85-

Defendant Heckler's failure to assure that the State of Georgia and Defendant Ledbetter have complied with the regulations and statutory provisions governing Title IV-D has deprived Plaintiffs WEHUNT, BROWN and WHITE of rights accruing to them pursuant to 42 U.S.C. Sections 651 *et seq.* and 45 C.F.R. Part 301 *et seq.*

EQUITY

-86-

As a result of Defendants' failure to comply with their obligations under the Social Security Act, Plaintiffs WEHUNT and BROWN, and the class they represent, have suffered severe and irreparable injury. Plaintiff WEHUNT herself has lost the regular payment of child support for her children, with regard to Defendant Ledbetter's requirement that Plaintiff WEHUNT secure from

Tiffany's father a signed statement acknowledging paternity, rather than initiating paternity and support recovery proceedings himself or through his agents against Tiffany's father. Furthermore, Plaintiffs WEHUNT and BROWN have suffered severe and irreparable injury with regard to Defendant Ledbetter's failure to initiate paternity and support recovery proceedings himself or through his agents against the fathers of children of Plaintiffs WEHUNT and BROWN and the Plaintiff class they represent.

-87-

As a result of Defendants' failure to comply with their obligations under the Social Security Act, Plaintiffs WEHUNT, BROWN and WHITE, and the class they represent, have suffered severe and irreparable injury, in that Plaintiffs are without funds to themselves retain counsel to initiate paternity and support proceedings on their behalf, and Defendant Ledbetter has failed to initiate such proceedings. Plaintiff WEHUNT and the class she represents have suffered further injury in that Defendant Ledbetter has denied that payments made for support of their children are child support, the Plaintiff WEHUNT and the class she represents have thus lost the benefit of the $50 disregard of child support established by federal law. Furthermore, Defendant Ledbetter is attempting to recover or has recovered from Plaintiff WEHUNT an alleged overpayment of benefits which would not have occurred but for Defendant Ledbetter's illegal definition of "child support."

Plaintiffs have no adequate remedy at law to redress the stated violations of their rights by Defendants. Plaintiffs will continue to suffer irreparable harm unless and until the declaratory and injunctive relief sought herein by them is granted by this Court.

PRAYERS FOR RELIEF

WHEREFORE, Plaintiffs JOY D. WEHUNT, GWENDOLYN BROWN, and BRENDA WHITE, pray that this Court:

A. Assume jurisdiction of this action;

B. Determination pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure that this action be maintained as a class action;

C. Declare that the acts and practices of Defendant Ledbetter in failing to initiate paternity and enforcement of support proceedings on behalf of Plaintiffs WEHUNT and BROWN and the class they represent have subjected Plaintiffs WEHUNT and BROWN and the class they represent to a deprivation of their rights under the Social Security Act, 42 U.S.C. Section 601 *et seq.;*

D. Declare that the acts and practices of Defendant Ledbetter in failing to initiate enforcement of support proceedings on behalf of Plaintiffs BROWN and WHITE and the class they represent have subjected Plaintiffs BROWN and WHITE and the class they represent to a deprivation of their rights under the Social Security Act, 42 U.S.C. Section 601 *et seq.;*

E. Declare that the acts and practices of Defendant Ledbetter in imposing additional requirements upon the definition of "child support" for purposes of determining eligibility for the $50.00 child support disregard have subjected Plaintiff WEHUNT and the class she represents to a deprivation of their rights under the Social Security Act;

F. Declare that the acts and practices of Defendant Ledbetter in failing to notify Plaintiffs WEHUNT, BROWN and WHITE and the classes they represent of the result of the assignment of their rights to collect child support to the State of Georgia are fundamentally unfair to Plaintiffs WEHUNT, BROWN and WHITE, contrary to their rights under the Constitution of the United States;

G. Declare that the acts and practices of Defendant Heckler in failing to properly or adequately review and monitor the State of Georgia's operation of the child support recovery program and the AFDC program, and have subjected Plaintiffs WEHUNT, BROWN and WHITE to a deprivation of their rights under 42 U.S.C. Sections 601 *et seq.* and 651 *et seq.*;

H. Issue a preliminary and permanent injunction requiring Defendant Ledbetter to initiate and conclude paternity proceedings on behalf of the children of Plaintiffs WEHUNT and BROWN and members of the class they represent;

I. Issue a preliminary and permanent injunction requiring Defendant Ledbetter to initiate and conclude recovery of child support proceedings on behalf of Plaintiffs WEHUNT, BROWN and WHITE and the classes they represent;

J. Issue a preliminary and permanent injunction requiring Defendant Ledbetter to refrain from attempting to collect from Plaintiff WEHUNT a claimed overpayment of AFDC benefits, or taking any future action against Plaintiff WEHUNT based upon Defendant Ledbetter's illegal definition of "child support";

K. Issue a preliminary and permanent injunction requiring Defendant Heckler to properly review, evaluate and supervise Defendant Ledbetter's actions under the Georgia Title IV-A (AFDC) program;

L. Issue a preliminary and permanent injunction requiring Defendant Heckler to properly review, evaluate and supervise Defendant Ledbetter's actions under the Georgia Title IV-D (Child Support Recovery) program;

M. Retain jurisdiction over Defendants until such time as the Court is satisfied that the practices, policies and omissions alleged herein are corrected and will not recur;

N. Assess all costs of this action against Defendants;

O. Award Plaintiffs and the classes they represent reasonable attorney's fees; and

P. Grant to Plaintiffs and the classes they represent such other and additional relief as this Court deems appropriate and just under the circumstances.

/s/ Kay A. Giese
KAY A. GIESE (GBN 293212)

P.O Box 8044
Athens, Georgia 30603
(404) 542-2031

/s/ John Riemer by KAG
JOHN RIEMER (GBN 605425)

P.O. Drawer 1337
Gainesville, Georgia 30503
(404) 535-5717

/s/ Nancy Lindbloom by KAG
NANCY LINDBLOOM (GBN 452912)

P.O. Drawer 1337
Gainesville Georgia 30503
(404) 535-5717

/s/ Phyllis J. Holmen by KAG
PHYLLIS J. HOLMÉN (GBN 363850)
JOHN L. CROMARTIE, JR. (GBN 197200)

133 Luckie Street, N.W.
8th Floor
Atlanta, Georgia 30303
(404) 656-6021

Attorneys for Plaintiff

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No. 89-1030

In the Supreme Court of the United States

OCTOBER TERM, 1989

GWENDOLYN BROWN, PETITIONER

v.

JAMES G. LEDBETTER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

ANTHONY J. STEINMEYER
IRENE M. SOLET
Attorneys

Department of Justice
Washington D.C. 20530
(202) 633-2217

1990

QUESTION PRESENTED

Whether petitioner, a recipient of Aid To Families With Dependent Children (AFDC) under Title IV-A of the Social Security Act, 42 U.S.C. 601 *et seq.*, may bring an action under 42 U.S.C. 1983 to challenge the failure of state officials to provide particular child support enforcement services to her in purported violation of Title IV-D of the Social Security Act, 42 U.S.C. 651 *et seq.*

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1030

GWENDOLYN BROWN, PETITIONER

v.

JAMES G. LEDBETTER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-86a) is reported at 875 F.2d 1558. The opinions of the district court (Pet. App. 1c-37c, 3d-18d) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1989. A petition for rehearing was denied on September 26, 1989 (Pet. App. 1b-2b). The petition for a writ of certiorari was filed on December 22, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner receives Aid To Families With Dependent Children (AFDC) benefits from the State of Georgia

under Title IV-A of the Social Security Act, 42 U.S.C. 601 *et seq.* In this action she challenges the alleged failure of state officials to provide child support enforcement services pursuant to Title IV-D of the Social Security Act, 42 U.S.C. 651 *et seq.*

AFDC is a cooperative federal and state program providing assistance to families deprived of child support through the death, disability, or absence of a parent when the family's income falls below a specified level determined to be necessary for subsistence. 42 U.S.C. 606(a). States must administer the program in accordance with federal statutory and regulatory requirements to receive the federal financial contribution. 42 U.S.C. 602(a). The Social Security Act requires each State, as a condition of receiving federal AFDC funds, to set up a child support enforcement unit to locate absent parents, establish paternity, and obtain child and spousal support. 42 U.S.C. 602(a)(27), 652(a)(1). The federal government supplies 66% of the administrative costs of this unit.[1] In addition, the federal government makes incentive payments to reward States for effective operation of the child support enforcement program. 42 U.S.C. 658.

As a condition of receiving AFDC benefits, individual recipients are required to assign to the State any rights they may have to spousal or child support, and to cooperate with the State's efforts to establish paternity for their children and obtain child support. 42 U.S.C. 602(a)(26). If child support is recovered, the first $50 is passed through to the AFDC recipient without affecting her eligibility for

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[1] The federal share was 70% in fiscal years 1984 through 1987, 68% in fiscal years 1988 and 1989, and 66% for fiscal year 1990 and thereafter. 42 U.S.C. 655(a)(2). Certain specific services (*i.e.*, automatic data processing and information retrieval, laboratory services in establishing paternity) are funded by the federal government at a 90% level. 42 U.S.C. 655(a)(1).

the program or the amount of her benefit. 42 U.S.C. 602(a)(8)(A)(vi), 657 (b)(1). In addition, in States (such as Georgia) where the level of AFDC benefit payments was below the state standard of need in July 1975, support payments collected by the State are passed through to the recipients to "fill the gap" between the actual amount of benefits and the state standard of need. 42 U.S.C. 602(a)(28); see also *Quarles* v. *St. Clair*, 711 F.2d 691, 694-695 (5th Cir. 1983).

Title IV-D directs the Secretary of Health and Human Services to establish standards for state child support enforcement programs (42 U.S.C. 652(a)(1)) and to conduct periodic audits to determine whether actual operation of each State's program complies with all statutory and regulatory requirements (42 U.S.C. 652(a)(4)). Title IV-D also establishes monetary penalties, ranging from one to five percent of the federal contribution to the State's AFDC program, if a federal audit reveals that the State's child support enforcement unit is not operating in "substantial compliance" with federal requirements. 42 U.S.C. 603(h).[2] The Secretary has determined by regulation that a state program will be deemed in "substantial compliance" if it meets audit criteria for most essential program functions in 75% of the individual cases reviewed. 45 C.F.R. 305.20.

2. Petitioner has three minor children. The oldest was born out of wedlock. Pet. App. 14a-16a. Petitioner is divorced from the father of her two younger children, and the divorce decree ordered the father to pay child support for both of them. *Id.* at 16a. At the time of the court of appeals decision, the Georgia Title IV-D agency had not established paternity for petitioner's oldest child and had not collected the support payments for her younger

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[2] The size of the penalty depends on the number of consecutive findings of noncompliance. 42 U.S.C. 603(h).

children. Pet. App. 15a-16a. In his Brief in Opposition, however, respondent Commissioner of the Georgia Department of Human Resources indicates that the State has now obtained an order of paternity concerning petitioner's oldest child and that the child's father is now paying support for her. The Commissioner also reports that the father of the two younger children also has now made support payments. Resp. Br. in Opp. 6-7.

Petitioner intervened in an action in the United States District Court for the Northern District of Georgia brought by another AFDC recipient, pursuant to 42 U.S.C. 1983, to obtain Title IV-D agency assistance in establishing paternity and obtaining support for her child. Pet. App. 19a.[3] Together with another intervenor, their second amended complaint sought redress against the Commissioner, based on his alleged systematic failure to operate a statewide child support enforcement program as required by Title IV-D and its implementing regulations, and against the Secretary based on his alleged failure to assure that the Georgia IV-D program complied with federal statutory and regulatory standards. Pet. App. 20a.

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[3] The original plaintiff sued the Commissioner of the Georgia Department of Human Resources seeking declaratory and injunctive relief for alleged violations of her right to AFDC benefits under Title IV-A of the Social Security Act, her right to child support enforcement services under Title IV-D of the Act, and her due process rights under the Fourteenth Amendment. Pet. App. 18a; Resp. Br. in Opp. App. 12-14. The complaint also named as a defendant the Secretary of Health and Human Services, alleging that the Secretary had failed to assure compliance by the State with the requirements of Titles IV-A and IV-D and regulations issued thereunder. Pet. App. 19a; Resp. Br. in Opp. App. 14-15. The Title IV-A claims against the Commissioner concerning payment of AFDC benefits were eventually settled by a consent order. Pet. App. 18a-19a. Petitioner, joined by the original plaintiff and another intervenor, then filed an amended complaint and moved for class certification. *Id.* at 19a.

The district court dismissed the complaint on the grounds that Congress had foreclosed private enforcement of Title IV-D against the State under Section 1983 and that Title IV-D created no implied right of action. Pet. App. 22a, 13c-31c.[4]

Petitioner and her co-plaintiffs then filed a third amended complaint asserting claims only against the Secretary under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, and for mandamus relief pursuant to 28 U.S.C. 1361. Pet. App. 22a. The district court dismissed this complaint as well (*id.* at 24a, 3d-18d), holding that plaintiffs lacked standing under the APA because their complaint failed to set forth facts sufficient to establish either causation or redressability. *Id.* at 24a, 8d. Petitioner alone then filed a notice of appeal challenging the orders dismissing the claims against the Commissioner and the Secretary. *Id.* at 24a.

3. The court of appeals affirmed. With regard to petitioner's claims against the Commissioner, the court recognized that under this Court's decision in *Maine* v. *Thiboutot*, 448 U.S. 1 (1980), and subsequent cases, a violation of a federal statute is generally cognizable under Section 1983, but such an action is not available if Congress has either foreclosed private enforcement or has created no enforceable rights in the relevant statutory provisions. Pet. App. 25a-26a. The court of appeals pointed out that in *Cort* v. *Ash*, 422 U.S. 66 (1975), this Court articulated four factors for determining whether a statute creates a private cause of action (Pet. App. 28a-29a); the court of appeals concluded that the first *Cort* factor—whether that plaintiff is one of the class for whose

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[4] The district court also denied plaintiffs' request for class certification. See Pet. App. 22a, 36c.

"especial benefit" the statute was enacted—is helpful to the Section 1983 analysis. Pet. App. 29a-30a. The court then determined that Title IV-D of the Social Security Act created no enforceable rights to child support enforcement services for individual AFDC recipients, and found it unnecessary to reach the issue of whether the statute foreclosed private remedies. Pet. App. 26a, 30a-36a.

The court based its conclusion regarding the lack of enforceable rights on several characteristics of the statute and its legislative history. Pet. App. 30a-31a. Unlike Title IV-A of the Act, which provides funds to children in need, Title IV-D seeks to recover those funds for the Treasury. Pet. App. 31a. In enacting Title IV-D, Congress was primarily concerned with collecting support payments to lessen the cost of the AFDC program to the taxpayers and to reduce the welfare rolls. Pet. App. 31a-34a. The court also pointed out that Title IV-D is not a legal assistance program for AFDC recipients, but rather a program in which recipients assign their support rights to the State and agree to cooperate with the State in its efforts to establish and enforce support obligations. Pet. App. 35a-36a. Accordingly, the court concluded that petitioner did not have rights to support enforcement services under Title IV-D that were enforceable through a Section 1983 action. Pet. App. 36a.

With respect to the claims against the Secretary, the court of appeals held that petitioner lacked Article III standing. Pet. App. 36a-44a. Although the court acknowledged that petitioner had alleged two types of cognizable injury—the loss of the $50 of child support that would be passed through to her if collected by the State and the failure to establish her child's paternity—the court held that the nexus between these injuries and the Secretary's alleged unlawful action was "attenuated at best." *Id.* at 42a. The court further held that petitioner had failed to

show that her situation would be improved if the court were to award the relief she sought against the Secretary. *Id.* at 43a. The court pointed out that where, as here, the statute provides its own comprehensive enforcement scheme, these enforcement procedures may not be bypassed by means of individual actions under Section 1983. Pet. App. 43a-44a.[5]

ARGUMENT

Although this case is not moot, its practical significance has been substantially diminished because petitioner has now obtained the support services that she sought. In any event, this case does not warrant review because the court of appeals correctly rejected petitioner's claim that Title IV-D of the Social Security Act establishes rights to particular child support enforcement services enforceable through a Section 1983 action.[6]

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[5] Judge Clark dissented from the decision with respect to the affirmance of the dismissal of the Section 1983 action against the Commissioner. Pet. App. 46a-86a.

[6] Petitioner does not seek review of the dismissal of her claims against the Secretary. Pet. 12 n.1. Under Rule 12.4 of the rules of this Court, the Secretary nevertheless remains a party before this Court. The Secretary also retains a substantial interest in this matter. As discussed below, the Title IV-D program was designed by Congress to save federal and state funds by recovering assigned support payments from absent parents of children in families receiving AFDC benefits, and to reduce the number of welfare recipients. This plan would be undermined if, through availability of a cause of action under Section 1983, Title IV-D became an entitlement program which guaranteed specific child support enforcement services to all individual AFDC recipients. As the court of appeals pointed out (Pet. App. 44a), recognition of a Section 1983 remedy in this case would generate "multitudinous suits" in federal court, diverting state resources from the effort to operate the most efficient overall program of child support enforcement.

1. Although not moot,[7] this case is an inappropriate vehicle for review because petitioner has now obtained the essential elements of the relief that she requested. The Commissioner reports that he has been successful in establishing paternity for petitioner's oldest child and that since May 1989 the child's father has been paying support on her behalf. Resp. Br. in Opp. 6. In addition, the Commissioner reports that the father of petitioner's two younger children has made support payments under his divorce decree with petitioner. *Id.* at 6-7. Petitioner thus has now received the services to which she claims to be entitled under Title IV-D. Particularly in light of these changed circumstances, review of petitioner's claims is not warranted.

2. In any event, those claims are not well founded. Petitioner's principal contention is that there is widespread confusion concerning the proper standard for determining whether Section 1983 actions may lie from violations of federal statutes, and that, reflecting this confusion, the court of appeals improperly relied upon *Cort* v. *Ash*. Pet. 13-36. This contention is unavailing.

Contrary to petitioner's submission, the governing standard for evaluating whether Section 1983 actions may be brought for claimed violations of federal statutes is settled. Violations by state officials of federal statutes give rise to a cause of action under 42 U.S.C. 1983 (*Maine* v. *Thiboutot*, 448 U.S. 1 (1980)); a Section 1983 action is not available, however, if (1) Congress has foreclosed private enforcement of the claim in the statute itself (*Middlesex*

[7] Petitioner's claim is not moot because the plaintiffs' complaint included a request for judicial oversight of systematic reform. See, *e.g.*, Second Amended Complaint, para. 90 (C.A. E.R. 4) (requesting that the court "[r]etain jurisdiction over Defendants until such time as the Court is satisfied that the practices, policies, and omissions alleged herein are corrected and will not recur").

County Sewerage Auth. v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981)), or (2) the pertinent federal statute does not create "enforceable rights" for the purpose of Section 1983 (*Pennhurst State School & Hosp.* v. *Halderman*, 451 U.S. 1 (1981)). See also *Golden State Transit Corp.* v. *City of Los Angeles*, 110 S. Ct. 444, 448-449 (1989); *Wright* v. *City of Roanoke Redevelopment & Housing Auth.*, 479 U.S. 418, 423 (1987). Recognizing that implied cause of action cases like *Cort* v. *Ash*, can be helpful tools in the analysis of congressional intent that this standard requires, this Court itself has cited *Cort* and its progeny in Section 1983 analysis of federal statutes.[8] Thus, contrary to petitioner's assertion, there is no widespread confusion regarding the proper standard for evaluating whether a Section 1983 action may lie for violations of a federal statute.[9]

The court of appeals correctly applied the established standard from *Thiboutot*, *Sea Clammers*, and *Pennhurst* (Pet. App. 24a-26a, 36a) and concluded that, under *Pennhurst*, Title IV-D does not create "enforceable rights" to particular child support enforcement services for individ-

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[8] See *Golden State Transit Corp.*, 110 S. Ct. at 448 (citing the *Wright* dissent and noting its citation to *Cort* v. *Ash*); *Wright*, 479 U.S. at 428 (citing *Cannon* v. *University of Chicago*, 441 U.S. 677, 704-707 (1979), which applies *Cort* v. *Ash*).

[9] As petitioner points out (Pet. 17 n.3, 25 n.5), *Baliles* v. *Virginia Hospital Ass'n*, No. 88-2043 (argued Jan. 9, 1990), presents a question concerning the availability of a Section 1983 remedy for violations of a federal statute. Because the question presented in that case concerns the availability of such a remedy under a particular statute, rather than a challenge to the governing standard, it is not necessary to hold this case for disposition in light of *Baliles*. It should be pointed out, however, that both the petitioner's and the respondent's briefs in *Baliles* discuss, at least in passing, the relationship between *Thiboutot* and the *Cort* v. *Ash*/*Cannon* v. *University of Chicago* implied right of action line of cases. See Pet. Br. 10-11; Resp. Br. 22 n.24.

ual AFDC recipients. The fact that the court invoked the first factor of *Cort* v. *Ash* to aid its inquiry does not in any way undermine the correctness of its analysis.

As the structure of the Title IV-D statute demonstrates, the program was crafted to help the government recoup welfare costs and reduce the number of welfare recipients. The entire Title IV-D program is built around the statutory requirement that AFDC recipients assign their rights to child support to the State and cooperate with the State in its efforts to establish paternity and enforce support obligations. 42 U.S.C. 602(a)(26). The child support rights "assigned to the State under section 606(a)(26)" become "an obligation *owed to such state* by the individual responsible for providing such support." 42 U.S.C. 656(a) (emphasis added). Pursuant to that assignment of support rights, it becomes the State's prerogative to undertake the support enforcement efforts it deems appropriate under an overall plan meeting federal statutory and regulatory standards. 42 U.S.C. 602(a)(27), 652(a)(1). Moreover, although the federal standards require statewide operation of a program of services designed to serve all AFDC applicants and recipients (see 45 C.F.R. 302.31, 302.33), whether a State has adequately met these federal requirements is measured by a standard of "substantial compliance." 42 U.S.C. 603(h). The Secretary has determined by regulation that "substantial compliance" means meeting audit criteria in 75% of individual cases. 45 C.F.R. 305.20.[10] Clearly, this statute and its implementing regula-

[10] The regulations specifically permit States to develop a case assessment and prioritization system for determining the order in which individual cases will be handled. 45 C.F.R. 303.10.

tions do not envision a program creating enforceable rights to services in specific individuals.[11]

The pass-through to the AFDC recipient of the first $50 per month of support payments collected by the State does not suggest otherwise. Whether such a pass-through will be available depends not only on successful efforts by the State to establish paternity or a support obligation, but also on the actual collection of support from an absent parent. Thus, a recipient's expectation of a pass-through payment is not a "specific and definite" right (*Wright*, 479 U.S. at 432) mandated by federal statute upon which petitioner can base a cause of action under Section 1983. For the same reason, the "fill the gap" provision (42 U.S.C. 602(a)(28)) also creates no such right. Like the $50 pass-through, expectation of this additional benefit is contingent on a variety of factors in addition to the State's efforts to establish and collect support obligations and also does not create a "specific and definite right." [12]

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[11] Indeed, if such a right were found and individual AFDC recipients were free to bring suits in federal court whenever they believed child support enforcement services provided by the State were inadequate, Title IV-D programs could be saddled with a burden of litigation which would frustrate accomplishment of their statutory objective.

[12] In view of its decision regarding the lack of enforceable rights, the court of appeals found it unnecessary to reach the issue whether the Title IV-D statute precludes private enforcement. Pet. App. 26a. In fact, the statute's comprehensive oversight and enforcement scheme demonstrates that Congress intended to foreclose private enforcement of its requirements through actions under Section 1983. Title IV-D requires the Secretary to audit every state program at least once every three years. 42 U.S.C. 652(a)(4). Federal regulations establish extensive and detailed audit criteria (see 45 C.F.R. Pt. 305). The statute itself prescribes monetary penalties ranging from one to five percent of the federal contribution to the State's AFDC program, to be imposed where a federal audit reveals that the State's Title IV-D agency is

Petitioner's suggestion (Pet. 19) that the court of appeals decision conflicts with the decisions of other courts regarding the availability of a Section 1983 cause of action for alleged state failure to comply with the Title IV-D program is unfounded. None of the cases cited by petitioner involved an action (as in this case) for particular child support enforcement services; each of the cases principally involved the fundamentally different situation of a challenge to the State's treatment of funds already in hand, at least some of which were earmarked by statute and regulation to the AFDC recipient.[13]

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not operating in "substantial compliance" with federal requirements. 42 U.S.C. 603(h). In addition, the statute provides for incentive payments to States that operate cost-effective Title IV-D programs. 42 U.S.C. 658. This complex scheme of federal monitoring, enforcement, and incentives demonstrates that Congress did not intend that state compliance with federal requirements for operation of child support enforcement programs would be policed through private suits by recipients under Section 1983.

[13] See *Bennett* v. *White*, 865 F.2d 1395 (3d Cir.), cert. denied, 109 S. Ct. 3257 (1989); *Quarles* v. *St. Clair*, 711 F.2d 691 (5th Cir. 1983); *Vanscoter* v. *Bowen*, 706 F. Supp. 1432 (W.D. Wash. 1988), appeal pending No. 89-35292 (9th Cir.); *Beasley* v. *Harris*, 671 F. Supp. 911 (D. Conn. 1987). To be sure, *Quarles* also involved a claim that a State had not made the necessary arrangements to enter into certain cooperative agreements at all (711 F.2d at 708-713); such a claim, however, is distinguishable from the claims for particular services at issue here. None of the cases cited by petitioner, moreover, addresses the question whether a Section 1983 cause of action is proper.

Petitioner's related claim (Pet. 19-23) that there is confusion in the courts of appeals regarding the availability of Section 1983 remedies under other statutes also does not warrant review. Like the court of appeals decision in this case, the holdings of those cases rest on an analysis of the specific statute at issue. Petitioner cites four decisions from courts of appeals analyzing remedies for violations of other statutes. Two of the four cite *Cort* as helpful in the Section 1983 analysis (see *Clallam County* v. *Department of Transportation*, 849 F.2d 424, 428 (9th Cir. 1988), cert. denied, 109 S. Ct. 790 (1989); *Edwards* v. *District of Columbia*, 821 F.2d 651, 654 n.4 (D.C. Cir. 1987)), and

3. Finally, petitioner also raises (Pet. 36-38) a due process claim concerning the possibility of receiving the $50 pass-through and the "fill the gap" payments. Although recognizing that the court of appeals did not address this issue, petitioner maintains that the result conflicts with *Bennett* v. *White*, 865 F.2d 1395 (3d Cir.), cert. denied, 109 S. Ct. 3257 (1989). Even if the court of appeals in this case had addressed the issue, however, there would be no conflict. *Bennett* had nothing to do with alleged failure by the State to provide particular child support enforcement services and the resulting failure of AFDC recipients to receive pass-through payments under 42 U.S.C. 657(b)(1) or fill-the-gap payments under 42 U.S.C. 602(a)(28). Instead, the court of appeals in *Bennett* recognized a due process interest by AFDC recipients in support payments *actually collected* by the state Title IV-D agency, not (as petitioner asserts here) in the speculative expectation of support payments that might be available if the state agency undertook efforts to establish and enforce support obligations by the absent fathers of petitioner's children – and if the absent fathers then actually made the required support payments. This speculative expectation, which is contingent on a number of factors, does not give rise to a protectable property interest under the Due Process Clause. Petitioner's claim of a due process violation thus does not warrant review.

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one does not even involve Section 1983 at all (see *Allandale Neighborhood Ass'n* v. *Austin Transportation Study Policy Advisory Committee*, 840 F.2d 258, 264 n.19 (5th Cir. 1988)). The fourth does disavow reliance on *Cort* in a footnote (see *West Virginia University Hospitals, Inc.* v. *Casey*, 885 F.2d 11, 18 n.1 (3d Cir. 1989), cert. granted on a different issue, No. 89-994 (Feb. 26, 1990)), but the court's statements are dicta and do not create a conflict warranting review; the court in that case recognized the same *Thiboutot-Sea Clammers-Pennhurst* framework as the court in this case (885 F.2d at 18), and rested its decision on a detailed discussion of the particular statute. *Id.* at 19-21.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

ANTHONY J. STEINMEYER
IRENE M. SOLET
Attorneys

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October Term, 1989

GWENDOLYN BROWN,

Petitioner,

vs.

JAMES G. LEDBETTER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

PHYLLIS J. HOLMEN
COUNSEL OF RECORD
FOR PETITIONER
SUITE 500
161 SPRING STREET, N.W.
ATLANTA, GA 30303
(404) 656-6021

GARY A. RATNER
LISA J. KRISHER
NANCY R. LINDBLOOM
JOHN L. CROMARTIE, JR.
SUITE 500
161 SPRING ST., N.W.
ATLANTA, GA 30303
(404) 656-6021

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No. 89-1030
In the Supreme Court of the United States
October Term, 1989

GWENDOLYN BROWN,
Petitioner

vs.

JAMES G. LEDBETTER,
Respondent.

PETITIONER'S REPLY BRIEF

I. This Court should resolve the confusion reflected in the Eleventh Circuit's reliance on Cort v. Ash to determine the existence of a "right...secured by the...laws" within the meaning of 42 U.S.C. § 1983.

Petitioner Gwendolyn Brown seeks to enforce a statutory and regulatory scheme which requires Respondent Ledbetter to establish and operate a system which provides timely and adequate child support recovery and

paternity establishment services to her and other Georgia families. See, Wehunt v. Ledbetter, 875 F.2d 1558, 1562 (11th Cir. 1989) (plaintiffs sought redress for the "systematic failure to (1) implement and operate a statewide child support enforcement program" which supplied adequate and timely services in compliance with federal statute and regulations).

Petitioner's claim was not grounded on an asserted individual right to receive a specific set of services for her, but was and is rather a claim to have available to her a state system of timely, adequate, and valuable services as required under Titles IV-A and IV-D of the Social Security Act, 42 U.S.C. §§ 602(a)(27) and 651 et seq. (1984). She alleged Respondent Ledbetter's child support recovery system did not do so. Respondents have each mischaracterized the nature of Petitioner Brown's claim in this case. (Resp. Sullivan's brief at 11-12; Resp. Ledbetter's

brief at 6).

Properly understood, it is clear that Petitioner's claim is not moot, as Respondent Sullivan acknowledges. Nothing currently in the record of this case suggests that Petitioner has ever received any services, let alone ongoing adequate and timely child support services. The right which Petitioner asserts -- the right to the range of child support and paternity establishment services which federal law mandates Respondent Ledbetter make available to her -- is an ongoing one, not satisfied by the voluntary provision of services by Respondent Ledbetter at a specific moment in time. Respondent Sullivan admits as much. Response, p. 8 n.7. Furthermore, Petitioner of course has an ongoing interest in the rights of the class she sought to represent.

This Court has recently decided another case which adds to the test for deciding a claim of rights enforceable under § 1983. In

Golden State Transit Corp. v. City of Los Angeles, ___ U.S. ___, 110 S. Ct. 444 (1989) (Golden State II), the Court found rights enforceable under § 1983 in the National Labor Relations Act (NLRA). Significantly, the Court prefaced its analysis by emphasizing the broadly remedial purpose of § 1983 for "official violation of federally protected rights", Id. at 448; see also 452), and that "[t]he burden to demonstrate that Congress has expressly withdrawn the remedy is on the defendant." Id. at 449.

Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608 (1986) (Golden State I), held that a city could not condition renewal of a cab franchise on the cab company's settlement of a strike. In the NLRA, Congress preempted the area of labor-management relations, and in particular, established a certain "free zone" of conduct, including the collective bargaining process, in which governments may not interfere. In Golden State

II, the Court held that the company could sue the city under § 1983 for compensatory damages for violation of the company's federal right to a collective bargaining process free of government interference, even though that right was not explicitly set out in the NLRA.

The Court said "...the availability of the § 1983 remedy turns on whether the statute, by its terms or as interpreted, creates obligations 'sufficiently specific and definite' to be within 'the competence of the judiciary to enforce,' Wright [v. Roanoke Redevelopment and Housing Authority], 479 U.S. [418] at 432, is intended to benefit the putative plaintiff, and is not foreclosed...", citing Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981), and Wright. 110 S. Ct. at 449.

Golden State II finds another source of right, beyond the terms of the statute, which were the focus in Pennhurst and Wright, and holds that the Congressional purpose behind

the particular language, structure, and history of a statute can create rights. The Court said, "The violation of a federal right that has been found to be implicit in a statute's language and structure is as much a 'direct violation' of a right as is the violation of a right that is clearly set forth in the text of the statute." 110 S.Ct. at 451. The Court found that participants in the collective bargaining process were intended beneficiaries of the statutory scheme. Notably, whether the scheme would inure to the benefit or detriment of the particular plaintiffs in Golden State was unknown to Congress and irrelevant; nevertheless, they were held to be "intended beneficiaries" of the scheme sufficient to be entitled to recover damages for its infringement. In the instant case, of course, Petitioner seeks no money damages, but simply access to the scheme of benefits and services which Congress created for her. Moreover, the legislative

history of the child support recovery program is replete with indications that the families are intended beneficiaries of the services, see, e.g., Wehunt, 875 F.2d at 1573 (Clark, J., dissenting) - an expression of Congressional intent analogous to the benefit the parties to collective bargaining found in the NLRA.

The other inquiry in Golden State II, was whether, as quoted earlier, the statute's obligations were "'sufficiently specific and definite' to be within 'the competence of the judiciary to enforce,'" citing Wright. In the instant case, Petitioner relies directly on the language of the statute, which imposes specific duties on Respondent Ledbetter, conditioning federal financial participation on compliance with those duties.

Golden State II's reference to the judicial history and the legislative intent behind a statute offers additional help to a court considering the enforceability of

federal statutes. This approach is particularly helpful in the instant case, as Title IV-A of the Social Security Act, 42 U.S.C. § 601 et seq., has been repeatedly held by this Court to create enforceable rights in those who are recipients of services and benefits thereunder.

Significantly, neither Respondent addresses the elements of the "enforceable rights" test derived from the cases discussed above. Respondent Sullivan continues simply to insist that the governmental treasuries are the beneficiaries of the child support recovery program, and that to allow Petitioner to enforce a claimed right to a program of services would "frustrate accomplishment of their statutory objective." (Br. at p. 11 n.11). If the program were accomplishing its statutory objective - establishing paternities and recovering child support - presumably it would not be in litigation. But Respondent Sullivan's distaste for litigation is simply

not part of the test for determining whether the Petitioner has enforceable rights in this statute.

Respondent Ledbetter's approach is even less illuminating. On page 10 of his Brief in Opposition he simply states "the court must consider whether the Plaintiffs...have sufficient rights...to create rights enforceable..." Such a circular statement fails to assist a court in construing a statute claimed to create rights.

Golden State II's explicit hospitality to § 1983 claims underscores the importance of the issue presented in the instant case, and why this Court should accept certiorari to further articulate the appropriate test for determining the enforceability of rights created by federal statutes. This Court's interest in this issue is reflected not only in Golden State II, but also Baliles v. Virginia Hospital Ass'n., No. 88-2043 (argued Jan. 9, 1990). Each of those cases differs

from this case, however: in Golden State II the Court found enforceable rights implicit in the language, structure, and history of statute, notwithstanding the statute's silence on the specific point; in Baliles, the issue is whether a provider of medical services - not the principle beneficiary under the statute - has enforceable rights under the Medicaid program, 42 U.S.C. § 1396 et seq. This Court needs to articulate how the test is applied to a case like the instant one, where the claim of right is made by a principal beneficiary of the statute, based on specific and definite statutory obligations compliance with which is a condition of federal financial participation, and where previous decisions have held the statute enforceable under § 1983.

II. This Court should hold that the lower courts erred in dismissing, without addressing, Petitioner's claim that she was deprived of property without due process when

the state failed to take action to enforce the rights to child support which she had assigned to it.

Both Respondents misunderstand the nature of Petitioner's constitutional claim. Petitioner's property rights do not "stem solely from the statutes upon which she relies". (Respondent Ledbetter's Brief, p. 16, Respondent Sullivan's Brief, p. 13). Rather, her property rights lie in (1) her right to recover child support from the absent parent of her children, a right created by the state court order establishing the obligation to pay child support, and (2) the right of her out-of-wedlock child to have a judicial determination of paternity. When she assigns those rights to the state, as she is required to do in order to receive Aid to Families with Dependent Children, the state must have an obligation not to arbitrarily deprive her of those rights by failing to act to enforce them in her stead. Respondent Ledbetter's failure

to operate a child support recovery program which makes reasonable efforts to enforce her assigned rights deprives her of those valuable rights. Of course, if they were enforced, she would presumably stand to gain by way of the "$50.00 disregard" and the "fill-the-gap budgeting," but those benefits are not the property interest at issue in Petitioner's constitutional claim.

While the holding in Bennett v. White, 865 F.2d 1395 (3d Cir.), cert. denied on other grounds, ___ U.S. ___, 109 S.Ct. 3247 (1989), is consistent with this analysis, it is not totally coextensive with the right asserted by Petitioner here. Neither lower court, however, addressed this issue, and Petitioner seeks to have this Court either order them to do so or determine the issue itself.

Therefore, it is respectfully submitted that the Petition for Certiorari should be granted.

PHYLLIS J. HOLMEN
NANCY R. LINDBLOOM
LISA J. KRISHER
GARY A. RATNER
JOHN L. CROMARTIE, JR.
Attorneys for Petitioner

Suite 500
161 Spring St., N.W.
Atlanta, GA 30303
(404) 656-6021